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F.C.C. 72R-316

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of THOMAS H. BOWEN, 1704 DAVIS AVENUE, VANCOUVER, WASH. Order to Show Cause Why the License for Radio Station KNC-0979 in the Citizens Radio Service Should Not Be Revoked	Docket No. 19252

APPEARANCES

Thomas H. Bowen, pro se; and *Vergil W. Tacy* and *Fred W. Vacca,* on behalf of the Chief, Safety and Special Radio Services Bureau, Federal Communications Commission.

DECISION

(Adopted November 2, 1972; Released November 6, 1972)

BY THE REVIEW BOARD: BERKEMEYER, PINCOCK AND KESSLER.

1. This proceeding was initiated by the Chief, Safety and Special Radio Services Bureau, by the issuance of an Order to Show Cause, SS 305-71, released May 7, 1971, why the license of Thomas H. Bowen of Vancouver, Washington, for radio Station KNC-0979 in the Citizens Radio Service should not be revoked. The Order alleged violation of the following Commission Rules: (a) maliciously interfering with the communications of another Citizens radio station in wilful violation of Section 95.83(a)(8); (b) transmitting superfluous communications in wilful violation of Section 95.83(a)(10); (c) transmitting of music, *i.e.*, retransmitting the transmissions of a standard broadcast station, in wilful violation of Section 95.83(a)(11); (d) transmitting continuous and uninterrupted communications for approximately 40 minutes, in wilful violation of Section 95.91(a); and (e) failure to identify by its assigned call sign during substantially continuous transmissions for a period of approximately 40 minutes, in wilful violation of Section 95.95(c). The Order also alleged that the licensee has a past history of violations of various Commission Rules. Bowen responded to the Order by letter received on May 20, 1971, in which he denied the allegations and requested a hearing in Vancouver, Washington. By Order, released May 24, 1971, the Acting Chief Administrative Law Judge scheduled a prehearing conference and hearing on July 12, 1971, to be held in Vancouver, Washington. At the hearing

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conducted by Administrative Law Judge Millard F. French the respondent appeared *pro se* and presented testimony. On December 17, 1971, Judge French issued an Initial Decision, FCC 71D–99, in which he concluded that the Order to Show Cause should be dismissed and that the Citizens band radio license of Thomas H. Bowen should not be revoked. Exceptions and a supporting brief were filed on February 1, 1972, by the Chief, Safety and Special Radio Services Bureau, which seek reversal of the Initial Decision. The Review Board has considered the Initial Decision in light of the exceptions and brief and its examination of the record. We agree with the Presiding Judge's findings and, except as modified herein and in the rulings contained in the attached Appendix, those findings are adopted. However, while we agree with the result reached by the Presiding Judge, we do not entirely agree with his reasons for reaching that result.

2. A brief summary of the relevant facts will assist in understanding our disposition. The violations alleged in the Order to Show Cause took place on January 20, 1971, and involved interference to the communications of Citizens radio station KRC–1423, licensed to the Port of Portland (formerly the Commission of Public Docks) (Port), Portland, Oregon. The Port uses its radio station in connection with its mobile units for the purpose of efficiently handling cargo and containers. Normally, the Port begins its communications with four mobile units at 8:00 a.m. and the units receive instruction at intervals of two to three minutes. During the period under examination the Port operated on Channel 13. Although there is some dispute about the exact dates, there is no controversy but that during the two to three weeks prior to January 20, 1971, the Port had received interference on at least two occasions to the extent that communications with its mobile units were ineffectual. The record also shows that during this same general period of time, Mr. Bowen visited the office in the tower located on the premises of the Port in order to complain that he and other Citizen band licensees could not use Channel 13 because the Port was on the Channel constantly. On January 20, 1971, beginning at approximately 8:30 a.m., the Port received interference consisting of music and talking, which was similar to the interference received on Channel 13 several days earlier. At the hearing, Mr. Bowen admitted, and his testimony was neither contradicted nor challenged, that he was part of a group who devised a plan to jam the Port's radio facilities and that his role was to sit in his car outside the gate of the Port on January 20, 1971, and to act as a "decoy like a duck to sit there and take the blame" while some other member or members of the group actually caused the interference. He admitted that he was from time-to-time monitoring the interference so caused, but stated that he was at no time transmitting over his station. Mr. Bowen further admitted that he agreed to do whatever the group thought he should do, and that if the group had asked him to interfere with the radio communications of the Port, he would have done so.

3. The Presiding Judge found that it "is clear from the evidence adduced with respect to the specific allegations recited in the Order to

Show Cause that [Bowen's] radio station KNC–0979 was not used for the transmissions that resulted in interference with the operation of the Port of Portland's communications on January 20, 1971. It is also clear that [Bowen] was, by his own admission, in part, responsible for such interference." The Presiding Judge then proceeded to scrutinize the conduct of the Port and concluded that the Port's use of Channel 13, practically on a constant basis, prevented the use of that frequency by other duly licensed stations and that such use of an interstation frequency for intra-station use should not be permitted or allowed, although legal under Section 95.41(d)(1). He also found that "upon the basis of the entire record . . . we of the Commission are not wholly free of fault." The Presiding Judge concluded that the "conduct on the part of the Commission may be used as an offset to the charges in the instant proceeding, and in view of the applicant's efforts by legitimate means to correct or remedy the violations that were occurring and were produced by the Port of Portland, may be used in mitigation of the implied violations of the Commission's rules with which the respondent in this proceeding is charged." The Presiding Judge therefore ordered that the Show Cause Order be dismissed.

4. The Safety and Special Radio Services Bureau, in its exceptions and brief, does not challenge the Presiding Judge's basic findings of fact but rather believes that the conclusions drawn therefrom are in error. The main thrust of the Bureau's argument is that the activities of the Port should not be used to "justify, excuse or mitigate the sanction to be applied in this proceeding." The Bureau contends that the only reason the evidence relating to the Port's conduct was admitted without objection was for the purpose of establishing the "nature, extent and motivation" for Bowen's actions. The Bureau notes that it has been consistently held that whether or not a licensee other than respondent violated the Commission's Rules is an independent situation and must not affect the sanction to be applied, citing, *Sam Rosenberg Auto Sales*, 5 FCC 2d 441, 448 (1966); and *Raymond W. Gill*, 7 FCC 2d 90, 100 (1966). The Bureau then argues that the Presiding Judge's ultimate decision is predicated on a misinterpretation of various sections of Part 95 of the Commission's Rules and that, in fact, the Port's use of its Citizens radio license "was in keeping with [Part 95's] fundamental purposes and within the rules promulgated by the Commission for the use of these frequencies." In sum, the Bureau asserts that it has sustained its burden of proof by establishing that respondent "was a principal actor in an unlawful conspiracy to maliciously interfere with another licensee's legitimate communications in the Citizens Radio Service." The Bureau also urges that Bowen's "lack of integrity and candor" in originating and perpetuating a deception on the Commission are contrary to the public interest and Bowen's actions as a self-styled vigilante cannot be condoned—particularly in view of Bowen's erroneous understanding of the Rules.

5. As previously indicated, the Review Board agrees with the Presiding Judge's ultimate conclusion that the Order to Show Cause

should be dismissed. However, we do not agree with the Judge's reliance on the Port's conduct in arriving at this conclusion. Rather, we agree with the Bureau that allegations that others have been violating the same Commission Rules do not provide an adequate basis for disregarding the respondent's violations. Therefore, as the Bureau points out, the Port's activities are irrelevant to the disposition of this proceeding, except to show the nature, extent and motivation for Bowen's conduct. Thus, there is neither need nor justification for any further discussion of the Port's activities. Nevertheless, under the circumstances here, the Board perceives no basis for revoking Bowen's license pursuant to the Order to Show Cause issued in this proceeding. The Rules cited in that Order do not encompass Bowen's activities, and it is undisputed that he did not commit any of the Rule violations alleged in that Order; rather, he merely sat in his car and acted as a decoy while other unknown person(s) were actually jamming the Port's facility. Nor was the Order to Show Cause amended or a new Order issued when it became apparent at the hearing that Bowen was not guilty of the charges specified in the Order. Moreover, the Bureau has urged no theory of law and has cited no precedent to support its argument that under the circumstances here Bowen's license should be revoked because he was a principal actor in an "unlawful conspiracy" and because his actions demonstrate a lack of integrity and candor contrary to the public interest. While the Board does not condone Bowen's behavior, the record does not reflect that he concealed or misrepresented any facts to the Commission either in his testimony or his pleadings, and, in the absence of a specific charge and proof of violation of some particular Commission Rule, statute or other law, we do not believe that general allegations of conspiracy or conduct contrary to the public interest afford any basis for revoking Bowen's license in this proceeding.[1] Finally, the Board notes that it expresses no opinion as to the ultimate conclusion in this proceeding had different issues been specified or had the present issues been modified.[2]

6. Accordingly, IT IS ORDERED. That the Order to Show Cause why the license of radio Station KNC–0979 in the Citizens Radio Service issued to Thomas H. Bowen should not be revoked, IS VACATED and the proceeding IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION,
DONALD J. BERKEMEYER,
Member, Review Board.

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[1] In view of what has transpired in this and other Citizens band radio cases, the Safety and Special Radio Services Bureau might consider promulgation of a rule concerning group participation in violation of Commission Rules.

[2] There is, of course, nothing to prevent consideration of Bowen's actions in this matter at renewal.

APPENDIX

Rulings on Exceptions of the Safety and Special Radio Services Bureau

Exception No.	*Ruling*
1	*Granted.* The requested finding tends to show the "nature, extent and motivation" for Bowen's actions.
2	*Granted.*
3	*Granted.*
4	*Denied.* The findings excepted to also tend to show the nature, extent and motivation for Bowen's actions.
5, 6, 9, 10, 11	*Denied.* The Port of Portland's activities and alleged violations are irrelevant except to show the nature, extent and motivation of Bowen's actions. These exceptions are therefore without decisional significance.
7	*Granted.*
8	*Granted.*
12	*Denied.* The Judge's conclusions with regard to what transpired at the Port are accurate and adequate.
13, 14, 15	*Granted* to the extent that the Administrative Law Judge concluded that any actions by the Port of Portland or the Commission could be used to excuse respondent's actions; *denied* in all other respects for the reasons stated in paragraph 5 of the Decision.

F.C.C. 71D–99

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of THOMAS H. BOWEN, 1704 DAVIS AVENUE, VANCOUVER, WASH. Order to Show Cause Why the License for Radio Station KNC–0979 in the Citizens Radio Service Should Not Be Revoked.	Docket No. 19252

APPEARANCES

Thomas H. Bowen, pro se; and *Vergil W. Tacy* and *Fred W. Vacca,* for Chief, Safety and Special Radio Services Bureau, Federal Communications Commission.

INITIAL DECISION OF HEARING EXAMINER MILLARD F. FRENCH

(Issued December 15, 1971; Released December 17, 1971)

PRELIMINARY STATEMENT

1. By Order released May 7, 1971, the Commission directed Thomas H. Bowen to show cause why the license for radio station KNC–0979 in the Citizens Radio Service should not be revoked for violation of the following Commission Rules: (a) maliciously interfering with the communications of another Citizens radio station in wilful violation of Section 95.83(a)(8); (b) transmitting superfluous communications in wilful violation of Section 95.83(a)(10); (c) transmitting of music, i.e., retransmitting the transmissions of a standard broadcast station, in wilful violation of Section 95.83(a)(11); (d) transmitting continuous and uninterrupted communications for approximately 40 minutes, in wilful violation of Section 95.91(a); and (e) failure to identify by its assigned call sign during substantially continuous transmissions for a period of approximately 40 minutes, in wilful violation of Section 95.95(c).

2. The Order also alleged that the licensee has a past history of violations of the Commission's Rules, namely, Sections 95.91(b) (over five minutes); 95.95(c) (failure to identify); and 95.37(c)(1) (antenna over 20 feet), dating back as far as 1965. Said Order further alleged that the Commission would be warranted in refusing to grant a Citizens radio station license to the licensee if his original application were now before it.

3. The licensee responded to the Order by letter received on May 20, 1971, in which he denied the allegations indicated and requested a hear-

ing in Vancouver, Washington. By Order released May 24, 1971, the Acting Chief Hearing Examiner scheduled a prehearing conference and hearing to be held in Vancouver, Washington, on July 12, 1971. The respondent appeared *pro se* and presented testimony. The hearing commenced on July 12, 1971, and the record was closed the same day. Proposed findings of fact and conclusions of law were filed by the Bureau on August 30, 1971, and by the respondent on September 3, 1971. Neither of the parties filed reply findings and conclusions.

FINDINGS OF FACT

4. Thomas H. Bowen is the licensee of radio station KNC–0979, and has been a licensee in the Citizens Radio Service since approximately 1964.

5. The record shows that Mr. Bowen was issued a Notice of Violation on December 15, 1965, for failing to identify the station with which he was in contact, for transmitting communication in excess of five minutes (he transmitted for six minutes), and failing to observe the five-minute silence rule on November 18, 1965. He replied to that notice on December 23, 1965, as follows:

"In reply to the notice of violation I received. My log book shows every thing that your office has listed. I regret very much that this occured [sic] and shall do my best to keep any such errors from happinging [sic] in the future. Talking to KNC–2535 about his use of C B and asking him in for coffee I did not realize was a violation of FCC rules. To indentify [sic] the station at the end of a transmission I did not realize was the legal way to clear a call. My understanding was that each station clear it's own station. The call letters KNC–1189 belong to my wife and it is and was my understanding it was legal for me to use her's and for her to use mine. Please advise me if I am wrong. I hope I have answered this notice to your satisfaction but if not let me know and I shall try to comply with your wishes. I wish to thank your office for bringing these violations to my attention and shall do my best to keep from violating the rules and regulations in the future."

On October 17, 1966, Mr. Bowen was issued a Notice of Violation for operating his radio station in the Citizens Radio Service with a radio antenna and supporting structure in excess of 20 feet on October 13, 1966. He replied to that notice on October 25, 1966, stating that the antenna had been "removed completely." On June 5, 1967, Mr. Bowen was issued a Notice of Violation for transmitting communications in excess of five minutes on May 6, 1967. He replied to that notice on June 9, 1967, by denying the alleged violations and stating:

"I have checked with the other party involved and after both of us checking our log books, we feel positive that we were not the partys [sic] in this communication. We were together just last evening and heard someone else using the call letters: KNC 1695. After reading this notice a number of times, I am throughly [sic] convinced that was not I that you monitored. I always give a breaker's call sign and do not clear out in the manner in which this states. I keep a log of all calls and have since I entered into radio. On the date this notice states, I did not talk to the other party involved. I hope this will answer this notice to your satisfaction as it is the only way I can answer."

6. The Port of Portland (formerly the Commission of Public Docks) is the licensee of radio station KRC–1423 in the Citizens Radio Service, and operates its radio station in connection with the business of

the Port of Portland and the mobile units which it owns. Mr. Richard O. Boyle, an employee of the Port of Portland whose duties involve the supervision of communications with said mobile units owned by the Port, testified in the proceeding. During the period under examination here, the Port of Portland used its radio facilities operating on Channel 13. Normally, the Port begins its communications with four mobile units at 8:00 in the morning. In the course of this business operation, the mobile units are given instructions constantly all day long at intervals of every two or three minutes except for lunch-hour periods. This operation on Channel 13 has been going on since approximately November 1970. Subsequent to January 20, 1971, for reasons which appear *infra*, the licensee changed its operations from Channel 13 to Channel 3.

7. The activities of the Port of Portland in the use of its radio facilities had been the subject of a complaint to the Commission's Field Office located in Portland, Oregon, which complaint was filed by Mr. Bowen, the respondent in this proceeding. The transmissions of the Port's station were monitored by the Commission's Field Office *primarily* to ascertain if proper identification was being made. It was the recollection of Mr. Leslie Tinkler of the Portland, Oregon, Field Office, that Mr. Bowen's complaint concerned excessive use of the channel, but no investigation was made of this latter complaint.

8. Although there is some conflict in the recollection of the respondent and Mr. Boyle as to the exact dates, there is no controversy but that during a space of approximately three or four weeks, and on at least two separate occasions, interference was caused to the Port of Portland's radio facilities. About January 1, 1971, Mr. Boyle was made aware of interference to its station to the extent that the Port of Portland could not communicate with its mobile units. The type of interference consisted of music and, according to Mr. Boyle, "just general gibberish on the radio or on the set." The record shows that during this same general period of time, Mr. Bowen visited the office in the tower located on the premises of the Port. During this visit, Mr. Boyle observed Mr. Bowen driving a green and white El Camino with a white top. During the course of the conversation that ensued between Messrs. Bowen and Boyle, Mr. Bowen complained that the Port was overriding other stations, that he (Mr. Bowen) could not get his transmissions through in case of emergencies, and that he could not converse because the Port was on the frequency constantly in its normal course of business. Mr. Boyle stated, and Mr. Bowen confirmed, that his visit to the tower was for the purpose of ascertaining the names of Mr. Boyle's superiors in order that he might talk with them concerning his complaint. At the hearing, Mr. Bowen admitted that individuals in a group to whom he referred only as "they" had been responsible for prior interference on Channel 13 and would continue such interference in the future, until something was done about the constant use of Channel 13 by the Port of Portland.

9. Mr. Bowen denied that he belonged to any Citizens band organization or association. He denied that he personally either threatened Mr. Boyle with or, in fact, did cause interference on Channel 13. However, he admitted that he did tell Mr. Boyle sometime prior to January 20,

1971, that someone would jam or interfere with communications on that frequency unless the Port of Portland got off Channel 13.

10. Mr. Bowen admitted that he was part of a group who devised a plan to jam the Port's radio facilities. His role in the plan was to sit in his car outside the gate of the Port of Portland on January 20, 1971, and to act as a "decoy like a duck to sit there and take the blame" while some other member or members of the group actually caused the interference. He admitted that he was from time to time monitoring the interference so caused, but stated that he was not at any time transmitting over his station during the period covered by the allegations in the Order to Show Cause.

11. The following events transpired on January 20, 1971, when the Port of Portland began operating on Channel 13 at 8:00 a.m. At approximately 8:30 a.m., Mr. Boyle observed interference on Channel 13. This interference consisted of music and talking. Mr. Boyle indicated that this was similar to interference observed on Channel 13 on several days prior to January 20, 1971. Mr. Boyle recalled that on approximately January 1, 1971, Mr. Bowen drove to the tower in a green and white El Camino with a white top and that after Mr. Bowen arrived at the tower, the interference stopped. Mr. Boyle reported the interference on January 20, 1971, to the Portland Police. Patrolman Andrew Fox of the Portland Police answered the complaint. After meeting Mr. Boyle at the Port of Portland's tower, both men drove to a location across the street from the Port of Portland's administration building near Front Street in Portland, at which place Mr. Boyle observed a green and white El Camino pickup truck. Mr. Boyle indicated that he believed the interference originated from that motor vehicle. Mr. Boyle drove by the vehicle and then returned to his place of work. Mr. Boyle stated that the radio interference caused a considerable slowdown of the activities of the Port of Portland and resulted in an inefficient operation.

12. Andrew G. Fox, a patrolman in the Portland Police Department, Harbor Patrol, was on duty on January 20, 1971, and answered the complaint of radio interference by the Port of Portland. Patrolman Fox testified that when he arrived at the Port of Portland tower, he observed cowboy music coming over their receiver, and reported the radio interference to the Commission by telephone. Patrolman Fox then got into Mr. Boyle's pickup truck, and Mr. Boyle located an automobile described as an El Camino on Front Street near the Port. They returned to the Port of Portland, at which time Patrolman Fox proceeded in his patrol car to the location of the El Camino. When he approached the El Camino, Patrolman Fox could hear music. He explained to the occupant of the El Camino that he was investigating a report of radio interference to the Port of Portland. At that time the occupant of the El Camino turned off the music on a commercial radio station in his automobile. At the hearing, Patrolman Fox identified the occupant as Thomas Bowen. Mr. Bowen stated to Patrolman Fox that he had interfered with the Port's communications in the past but was not doing so at that time. Patrolman Fox noticed a "commercial type radio" and a radio with a microphone similar to his police mobile radio unit in Mr. Bowen's El Camino pickup. He

also observed a man who identified himself as Steven C. Graves sitting in Mr. Bowen's vehicle. Mr. Graves' automobile was located approximately two blocks from Mr. Bowen's automobile on the same street. Mr. Bowen turned on the receiver of his Citizens band mobile unit to Channel 13 in the presence of Patrolman Fox, and showed him how the broadcast music of KISN sounded emanating from his friend's (Mr. Graves) mobile unit. The officer did not recall questioning Mr. Graves concerning this matter, and departed soon after Mr. Tinkler of the Federal Communications Commission arrived at the location of Mr. Bowen's automobile.

13. Leslie R. Tinkler, a radio engineer employed by the Commission's Portland Field Office, testified that shortly before 10:00 a.m., on January 20, 1971, while engaged in his official duties, he received a telephone call from Patrolman Andrew Fox to the effect that the Port of Portland was experiencing radio interference in its Citizens band radio. At about 10:00 a.m., Mr. Tinkler tuned in Channel 13 on his radio receiver and heard music. He subsequently identified the music as that which originated from KWJJ, a local broadcast station. He tuned in Channel 13 of his mobile unit and proceeded to the area of the interference. Using the "hot and cold" method of location, i.e., observing the volume level of the signals on Channel 13, and the information supplied by Patrolman Fox, he was able to locate Mr. Bowen's automobile on Front Street. Mr. Tinkler had monitored Channel 13 for approximately 15 to 20 minutes in his mobile unit. Mr. Tinkler observed that the radio interference on Channel 13 stopped after he arrived at the location of Mr. Bowen's automobile. Mr. Tinkler identified himself and questioned Mr. Bowen. He stated that Mr. Bowen told him that he was "responsible" for the broadcast transmissions on Channel 13 and "that he had been jamming Channel 13 for the last two or two and a half hours." Mr. Tinkler observed a Citizens radio transceiver and a broadcast receiver installed side-by-side in Mr. Bowen's automobile, "a green and white Malibu El Camino," but none of the radio equipment was turned on at the time.

14. Mr. Tinkler noted that there was a man with Mr. Bowen at the time of his investigation of the radio interference complaint; however, he did not observe another private motor vehicle in the vicinity. During the period of monitoring Channel 13 on January 20, 1971, Mr. Tinkler noted that a proper call sign was not used, and the five-minute silent period was not observed by the person or persons causing the interference. As a result of his monitoring and his conversations with Mr. Bowen, Mr. Tinkler issued an Official Notice of Violation to the respondent on January 22, 1971, setting forth the violations he observed and attaching a transcript of the transmissions. The respondent replied to the Official Notice of Violation by letter dated January 29, 1971, denying the violations.

15. It was stated by Mr. Tinkler that, based on his personal knowledge, the Port of Portland was properly licensed in the Citizens Radio Service and authorized to transmit business communications on Channel 13 on January 20, 1971. Mr. Tinkler further stated that he had never issued a Notice of Violation to the Port of Portland for violation of any of the Commission's Rules.

16. Mr. Bowen testified, without dispute, that when he, and others, called the Port of Portland about the latter's constant use of Channel 13, and tried to ascertain the name of the person in charge, they were unsuccessful. Respondent then visited the tower "not to cause trouble, to try and find out if we couldn't get an understanding." He succeeded in talking to the official in charge and was told, "in his own words, they didn't give a damn about the people of Portland, they had a million dollar business to operate, and until they could get their FM band we would tolerate them whether we liked it or not." Mr. Bowen also stated, again without dispute, that the sets used by the Port of Portland were stamped "Johnsons, ten watt output" and that they were "working off a citizens band which is only allowed five watts."

17. Mr. Bowen also presented into evidence a copy of a petition that he said he had presented to the FCC with many names on it of holders of Citizens band radios. That petition is as follows:

"We, the undersigned taxpayers and citizens band radio operators of the Portland-Vancouver area, are writing to you for any assistance you may be able to render in restoring citizens band radio to comply with federal rules and regulations. For you to better understand our complaint, we have outlined our situation below.

"There are 23 frequencies, or channels, available for our use, with the exception of channel 9, which, according to Federal Communication Commission rules, is set aside for emergency traffic only.

"Channel 13 is a channel that the people of this area who are trying to abide by the Federal Communications Commission rules and regulations are trying to keep open for legal communication but the illegal people outnumber us by a great majority and continue to harrass [sic] us.

"The Portland Public Dock Commission uses their citizens band radio illegally on channel 13. Licensed station operators went to talk to them to inform them that their illegal practices could result in a fine from the Federal Communications Commission and that their practices were depriving the citizens and taxpayers from using their two way radios. This information was scorned by them. They said they could afford the fine and their operations were more important than conversations of every-day people.

"Enclosed you will find a copy of the complaint sent to the Federal Communications Commission both in Washington, D.C. and the district office in Portland, Oregon. When this complaint failed to get a response from the Federal Communications Commission, a few private citizens band radio operators tried their best to clean up the use of this communication system.

"A notice of violation, a copy of which is also enclosed, was sent to one of the parties involved in trying to clean up the citizens band radio. A copy of the answering letter is also enclosed.

"The federal laws for the use of citizens band radio are being violated to a great extent and have been for quite a while in this area and to the best of our knowledge, the enforcement agency that is to control this, the Federal Communications Commission, is doing nothing to better this situation.

"Any advise [sic] or assistance in this matter would be greatly appreciated."

18. When he could not get any action in response to his complaints, Mr. Bowen admitted that on some occasion prior to January 20, 1971, he agreed with some unidentified group of individuals to interfere with the communications of the Port of Portland on Channel 13 in an effort to get them to abide by the rules and regulations. Mr. Bowen also admitted that the group who planned the interference actually interfered with the Port of Portland's communications on January 20, 1971. As indicated *supra*. the respondent stated that his role in the plan of the group to interfere with the communications of the Port of

Portland was to act as a decoy on January 20, 1971, and take the blame for the interference. Respondent stated at the hearing that he does not now have Citizens band radio equipment and that he never will again. He further stated that "It is the matter of my license, the principle." Mr. Bowen admitted that he agreed to do whatever the group thought he should do, and that if the group had asked him to interfere with the radio communications of the Port of Portland, he would have done so.

ULTIMATE FINDINGS AND CONCLUSIONS

1. It is clear from the evidence adduced with respect to the specific allegations recited in the Order to Show Cause that radio station KNC–0979 was not used for the transmissions that resulted in interference with the operation of the Port of Portland's communications on January 20, 1971. It is also clear that the licensee of station KNC–0979 was, by his own admission, in part, "responsible" for such interference. The record shows that the respondent and a number of unidentified individuals agreed to interfere with the communications of KRC–1423, licensed to the Port of Portland, in an effort to disrupt the communications of that licensee's station for the purpose of forcing an abandonment of Channel 13, or at least to cause that licensee to observe the five-minute silence period that other Citizens band stations were required to observe. That this type of interference, occurring on January 20, 1971, accomplished its objective is evidenced by the fact that subsequent to January 20, 1971, the Port of Portland changed frequencies and began operating on Channel 3.

2. Section 95.91 with respect to duration of transmissions reads as follows:

"(a) All communications or signals, regardless of their nature, shall be restricted to the minimum practicable transmission time. The radiation of energy shall be limited to transmissions modulated or keyed for actual permissible communications, tests, or control signals. *Continuous or uninterrupted transmissions from a single station or between a number of communicating stations is prohibited,* except for communications involving the immediate safety of life or property.

"(b) *Communications between or among Class D stations shall not exceed 5 consecutive minutes. At the conclusion of this 5-minute period,* or upon termination of the exchange if less than 5 minutes, *the station transmitting and the stations participating in the exchange shall remain silent for a period of at least 5 minutes* and monitor the frequency or frequencies involved before any further transmissions are made. However, for the limited purpose of acknowledging receipt of a call, such a station or stations may answer a calling station and request that it stand by for the duration of the silent period. *The time limitations contained in this paragraph may not be avoided by changing the operating frequency of the station and shall apply to all the transmissions of an operator who,* under other provisions of this part, *may operate a unit of more than one citizens radio station.*" [Italic supplied.]

3. The Field Office of the FCC, as well as counsel for the Safety and Special Radio Services Bureau, interpret the above rule as not applying to transmissions of the type indulged in by the Port of Portland. In addition to the failure to cite the Port for violation of the five-minute silence rule, see page 76 of the transcript for the reaction of counsel to the above problem.

4. In addition to the foregoing rule, it is noted that Channels 1 through 8 and 10 through 23 are set aside by Section 95.41(d)(1) for communications between units of the same station, while under Section 95.41(d)(2) only Channels 10 through 15 and Channel 23 may be used for communications between units of different stations. Channel 9 is reserved for emergency communications. Here was an operation on Channel 13 by the Port of Portland, on a frequency that was specified for inter-station use, being, for all practical purposes, usurped by the Port for intra-station use. Their use of said frequency, practically on a constant basis, prevented the use of that frequency by other duly licensed stations, and thus reduced from seven to six the number of frequencies available for inter-station use. In view of the multitude of Citizens band stations duly licensed in the United States, such use of an inter-station frequency for intra-station use should not be permitted or allowed, although legal under Section 95.41(d)(1). After all, there are fifteen other frequencies available for intra-station use. It is unbelievable that the conduct of the Port was legal and proper. It would result in sheer bedlam and complete stoppage of communications between inter-station units if only seven operations similar to the Port elected to use Channels 10 through 15, plus Channel 23, for their business, as the Port used Channel 13 here.

5. The Port of Portland was issued a Citizens band station license on September 8, 1970, and began broadcasting in November 1970. Also, about the same time, the Port applied for an FM station license which, information indicates, has since been granted and is now being utilized in the business of the Port. The record is silent as to the urgency attending the business of the Port that prompted it to apply for a Citizens band station license and also an FM station license. The Citizens band station license was granted while the FM license was being duly processed. The Port of Portland has been in business for a long time, and the method of giving instructions to its units in the compound which it utilized prior to its decision to go to radio as a means of dispatching, evidently had worked, and the urgency attending the use of radio remains unexplainable. The mystery remains as to why the Port could not utilize the same method for dispatching its units that it had used prior to its use of radio, and why said method of giving instruction could not be continued pending action by the Commission on its FM station license, rather than its illegal use of the Citizens band station license on a purely temporary basis.

6. There is no doubt that the Port of Portland was violating the FCC rules and regulations by broadcasting instructions to its four mobile units constantly all day long at intervals of every two or three minutes except for lunch hour periods, and by using a base station power of 10 watts. While Section 95.91(b) of the Rules not only limits the duration of conversations to five minutes, and requires that a period of silence of five minutes duration be observed between broadcasts, Section 95.43 of said Rules limits the power input of Citizens band stations to five watts.

7. The frustration of the other Citizens band station license holders in the area over the constant, and thus illegal, use of one of the seven channels reserved for inter-station communication is understandable.

This record shows that Mr. Bowen and other Citizens band station license holders attempted to arrive at some solution to their problems with the Port of Portland and were unsuccessful. Mr. Bowen then complained to the FCC regional office about the situation and presented a petition of the Commission with the names of approximately 50 station license holders setting forth in detail their problem. After presenting the petition to the FCC and talking with the representatives for about a half hour, Mr. Bowen stated that he was told "to mind my own business and they would mind theirs, that they had given me a half hour of their time and they couldn't afford anymore, they had work to do." The witness further stated, "I was actually booted out of their office is the way I took it, and my friend took it the same way." Other than to check to see if the Port of Portland was properly identifying itself on Channel 13, the FCC took no action with respect to the illegal use of the channel by the Port. Yet, however, when, on January 20, 1971, the Port of Portland complained that their signal was being interfered with, the FCC began immediately monitoring the channel and continued to monitor the same for a period of between 20 and 30 minutes, during which time it noted the violations charged in the instant complaint or Order to Show Cause. Could this be a case of, whose ox is being gored?

8. There is absolutely no evidence in this case that indicates the respondent, Mr. Bowen, committed any of the violations charged in the Order to Show Cause. The situation existing here is analogous to the duck hunter who shoots one of the decoys while the real birds go blithely on their way. Of course, the action of the group of Citizens band stations in the area is not to be condoned under any circumstances, however when all their legitimate and legal efforts to get the Port of Portland to abide by the rules, and allow the frequency to be used by other Citizens band stations failed, the action of the group becomes understandable. It now appears that as a result of the action of the group, the Port of Portland moved its operation to Channel 3, and that now the situation has been cured by the Port abandoning its illegal use of Citizens band channels and the use of its FM transmitter in dispatching its units.

9. It is the contention of the Safety and Special Radio Services Bureau that, although the respondent did not violate any of the rules as charged, his license should still be revoked because he was an actor in a joint effort to prevent the use of the Citizens radio station by a licensee of the Commission. The Bureau further contends that Mr. Bowen's conduct in conspiring to interfere in another licensee's communication and his participation as a "decoy" to deceive the Commission is as reprehensible as the conduct of the actual perpetrator of the radio interference. The Bureau admits that the replies of Mr. Bowen were couched in clear and concise language, and affirmative statements which he made to the Commission and its engineer were correct. The Bureau then contends that Mr. Bowen's representations to the Commission were misrepresentative, by reason of omissions to state what the facts were as to his responsibility in connection with the transmissions which were the subject of the allegations in the Order to Show Cause. The Bureau contends that it was not until the hearing

that the respondent admitted all of the facts which had served to lead the Port of Portland employees, Commission representatives and an officer of the Portland Harbor Patrol on a merry chase after a decoy who had purposely planted himself, with an identifiable automobile, at a place where he would obviously be suspected. The Bureau admits that the conspiracy was well conceived, well executed and that its operation served to allow the station or stations making the transmissions to escape detection. The Bureau contends, and correctly so, that the method used was clearly unlawful under the Commission's rules. The Bureau further contends that "it is fundamental to the conduct of the Commission's regulatory processes, that it be able to rely upon its licensees to conduct their operations in such a manner as to serve the public interest." With the last mentioned observation, it is the opinion of the Examiner that the Bureau is absolutely right. However, upon the basis of the entire record in this case, it would appear that we of the Commission are not wholly free of fault in the instant matter. Here we were advised of the violations committed by the Port of Portland but did nothing about such violations, other than to see that the Port was using the correct and legal identification during its transmissions. No effort was made to investigate the charge of excessive use of the channel. Such conduct on the part of the Commission may be used as an offset to the charges in the instant proceeding, and in view of the applicant's efforts by legitimate means to correct or remedy the violations that were occurring and were produced by the Port of Portland, may be used in mitigation of the implied violations of the Commission's rules with which the respondent in this proceeding is charged. In taking the action that is ordered hereinafter, it might be well to remind the respondent that misrepresentation, even as a "decoy," is a very serious matter that can form a basis for refusal to license, and that in taking the action hereinafter recommended the Commission is paying far more attention to his rights as a citizen and as a licensee of this Commission than it is to the actions and conduct of the Port of Portland in the instant proceeding.

Accordingly, IT IS ORDERED that unless an appeal to the Commission is taken by any of the parties or the Commission reviews the Initial Decision on its own motion in accordance with the provisions of Section 1.276 of the Rules, the Order to Show Cause why the license of radio station KNC–0979 in the Citizens Radio Service issued to Thomas H. Bowen should not be revoked BE, and the same IS, HEREBY DISMISSED.

FEDERAL COMMUNICATIONS COMMISSION,
MILLARD F. FRENCH,
Hearing Examiner.

F.C.C. 72-964

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of AMENDMENT OF PART 78 OF THE COMMISSION'S RULES AND REGULATIONS TO ADD AN ALTERNATIVE CHANNEL ARRANGEMENT, REDUCING THE BANDWIDTHS AVAILABLE FOR INTRA-CITY STATIONS, AND ADDING CERTAIN OTHER CLARIFICATIONS	Docket No. 19623 RM-1936

NOTICE OF PROPOSED RULE MAKING

(Adopted November 1, 1972; Released November 6, 1972)

BY THE COMMISSION: COMMISSIONERS H. REX LEE AND HOOKS ABSENT.

1. Notice is hereby given of proposed rule making in the above-entitled matter.

2. The Commission has before it for consideration a petition (RM-1936) filed by Theta-Com of California [1] requesting rule making: (1) to provide an alternative channel arrangement for Local Distribution Service (LDS) stations in the Cable Television Relay Service, and (2) clarifying the Rules to make clear the situations in which non-adjacent channels may be used for LDS station operations. Responsive pleadings were filed by a number of parties all supporting Theta-Com's proposal. In addition a number of parties request that the proceeding be expanded to consider the adoption of a frequency plan for channels of return communication.

Alternative LDS Channel Arrangement

3. Theta-Com's concern is basically that the vestigial sideband AM transmission LDS frequency channelling plan specified in the Rules be compatible with possible frequency plans within cable television systems. Two difficulties are presented by the existing Rules. First, the existing channel plan (Section 78.18(a)(2)) was developed to facilitate the relay of up to 18 channels over two or more hops, and to provide frequency space for additional systems serving the same general area.[2] The available channels are divided into two nonduplicating groups of 18 channels. The existing channel plan is shown in Appendix A. Each group is arranged so that block processing of all channels is facilitated and there is no need for individual processing of channels between the LDS receiver and the cable interface. If more

[1] Theta-Com is a developer and manufacturer of LDS microwave equipment.

[2] The existing plan was suggested by Theta-Com's parent corporation in response to our *Notice of Proposed Rule Making in Docket 18542*, 16 FCC 2d 433 (1969). See *Report and Order in Docket 18542*, 20 FCC 2d 415 (1969) paragraph 12 (1969).

than twenty channels are to be relayed, as will clearly be necessary in connection with modern high capacity cable television systems,[3] channels from both groups must be used. Because the channels in the second group (Group D) are not contiguous with those in the first group (Group C) individual channel processing at the cable interface becomes necessary.[4] This individual processing, Theta-Com indicates, degrades the signals involved, reduces the reliability of the system as a whole, adds unnecessary expense, and causes maintenance problems that largely nullify the inherent advantages of the single sideband type of operation. According to Theta-Com the need to process each signal individually would double or triple the cost of each receiving site. To overcome the need for individual channel processing and facilitate the relay of more than 18 channels at a time, Theta-Com has suggested an alternative channel plan for use in non-repeatered operations that simply divides that available frequency space into 40 evenly spaced 6 MHz channels.[5]

4. In response to Theta-Com's rule making petition the National Cable Television Association filed comments agreeing in theory with the rule making request but suggesting that the Commission leave the specific cable channel allocations unstructured. That would be left as a detail to be described by each applicant. NCTA points out that there is as yet no industry wide standard for within-cable frequency allocations, so that it is difficult to devise an LDS frequency allocation plan compatible with all of the possible cable allocation plans. Comments were also filed by Cox Cable Communications, Inc., Buckeye Cablevision, Inc., Oak Electro/Netics Corporation, Cypress Communications Corporation, TelePrompTer Corporation, Athena Communications Corporation, and Varian/Micro-Link. All indicate their support for a change in the rules to facilitate the relay of a greater number of channels.

5. We believe that Theta-Com's petition has merit and are accordingly issuing this *Notice* proposing for adoption the channel allocation plan submitted by Theta-Com.[6] We are also interested in receiving comments with respect to the de-structured approach proposed by the NCTA.[7] We believe, however, at least initially that a structured approach facilitates the processing of applications and is desirable for that reason. We intend in any case to retain provision for case-by-case consideration of non-standard channel proposals.

Adjacent Channel Use

6. The second matter raised in Theta-Com's petition is a request for clarification of the rules to indicate specifically those situations in which adjacent channel use will not be required. Although the Rules

[3] The rules now require some cable television systems to have a greater than twenty channel capacity. See Section 76.251.

[4] Existing rules, Section 78.18(e), already recognize this problem to some extent by permitting alternative channel arrangements "on a case-by-case basis in order to avoid interference or to permit a more efficient use."

[5] Plus pilot channels. An additional plan following the same theory but offset to some extent and involving a smaller number of channels is also suggested for use where local interference factors prohibit use of its first suggested alternative.

[6] See Appendix B, Section 78.18(a) (2).

[7] See Appendix C, Section 78.18(k) for this alternative approach.

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do not now require adjacent channel use, we did state in adopting the LDS rules that adjacent channel use was "encouraged." [8] The reason for encouraging adjacent channel use is that it is difficult for other users of the available frequency space to make use of isolated channels surrounded by channels in use by other station licensees. Theta-Com points out, however, that there are a number of situations in which adjacent channel use is inefficient (for the first user) because it requires individual rather than block processing of signals at the interface between the LDS receiver and the cable system. We are asked to amend the rules to specifically indicate that adjacent channel operation is not required:

> a. when the channels to be transmitted via LDS are not all adjacent to one another either when received off-the-air or when carried on the CATV system; or
>
> b. where there is a potential for radio frequency interference problems; or
>
> c. when the LDS system is required to transmit CATV originated or translated UHF channels or other programming on non-adjacent channels which are to be inserted in non-adjacent "empty frequency" slots on the CATV system.

7. Although the existing Rules permit the use of non-adjacent channels when there is good cause therefor, we agree with Theta-Com that it would be useful to indicate with particularity those situations where non-adjacent channel usage will not be questioned. Section 78.18(e) as proposed in Appendix B contains essentially the language suggested by Theta-Com.

Return Communication Channels

8. In responding to Theta-Com's request for rule making, a number of parties requested that we also clarify the rules as they apply to return communications and adopt a frequency plan applicable to channels used for this purpose. Both TelePrompTer and Theta-Com (in a reply comment) suggest that seven 6 MHz channels between 12,711.45 MHz and 12,753.5 MHz be added to Theta-Com's suggested alternate Group D channel plan.[9] Under the Rules as they now stand no distinction is drawn between channels that are used for forward and channels that are used for return communications. The CAR Service frequencies are available for stations used to relay return communications and these stations may use any of the channels and methods of transmission permitted by the rules.

9. While we are not proposing any specific rule changes in connection with return channels at this time we are, in light of the comments received in response to Theta-Com's petition, requesting com-

[8] *Report and Order in Docket 18542*, supra, note 2 at page 420.
[9] Designated D(2) in proposed Section 78.18(a) (2) in Appendix B.

ments as to the need for clarification or amendments in the Rules to account for any technical or administrative problems unique to return communications channel paths or stations. This would include, but not be limited to, the need for new channel groupings as suggested by Tele-PrompTer and Theta-Com, possible bandwidth limitations (6 MHz), and the possibility that, when LDS stations are used, both forward and return communication paths should be included in the same application or filed concurrently.

12.5 MHz Bandwidth Limitation for Intra-City Stations

10. On our own motion we are including in this proceeding a proposal to limit all stations in the CAR service that do not use the frequency-division multiplexed/FM (FDM/FM) system of transmission and that are used for intra-city communications to a 12.5 MHz bandwidth.[10] Included among the intra-city stations would generally be local distribution service (LDS) stations, studio to head-end link (SHL) stations, pickup stations, as well as conventional CAR stations that are used for communication within the confines of a single cable television system community.[11] We believe this proposal is timely both in terms of the potential for congestion being created by these intra-city stations in our major cities and in terms of the developing technology which it appears will make this bandwidth reduction both technically and economically feasible over the distances involved in typical intra-city applications.[12] Comments on both the economic and technical costs that this change would require are requested. In making this proposal we recognize that the CARS band must accommodate two distinct modes of operation. A microwave service which is (a) inter-city, relaying what is generally a small number of television channels to a cable system head-end from a reception or interconnection point 30 or more miles away and which frequently involves several hops, and (b) is intra-city, involving relatively short-haul stations that bridge gaps within a cable network or supply short-distance feeds to the net-

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[10] See Appendix B, Section 78.18(1). Existing operations would be appropriately grandfathered. It is not proposed that this limitation apply to FDM/FM stations at this time because different technical factors are applicable to these stations.

[11] In the alternative the limitation might be made applicable to all CAR stations located in the areas most likely to be congested (e.g., the major television markets as defined in Section 76.5(g) of the rules) that have relatively short transmission paths (e.g. 10 miles or less).

[12] It should be noted that a 12.5 MHz channel spacing was initially proposed in the *Notice of Proposed Rule Making in Docket 15586*, FCC 64–720, 29 Fed. Reg. 11458, paragraph 24. After reviewing the comments concerning this narrow band proposal, the Commission, in the *Second Report and Order in Docket 15586*, 11 FCC 2d 709, (1968) stated: "We note also the strong objection to the proposed technical standards calling for widths limited to 12.5 Mc/s. These objections are found persuasive because the number of hops and route distances contemplated by CATV operators are considerably greater than those originally contemplated for this service, and also because relay operators place heavy reliance upon standard techniques and readily available equipment for effecting economical piece-meal expansion of their facilities." It would appear that these considerations are not applicable to the intra-city stations to which the limit would now be applied.

work, and which likely involve a larger number—possibly several dozen—of program channels.

11. Our intention here is to retain the rules as they are for inter-city stations but to limit stations which are used for intra-city transmission to a bandwidth of 12.5 MHz and thus to conserve spectrum space where congestion is most likely to occur.

Double Sideband AM Transmission

12. We are also proposing on our own motion, a channel assignment plan and specific frequency tolerance provisions applicable to stations using double sideband AM transmission. Section 78.103(a) of the rules specifies that a cable television relay station may be authorized "to employ any type of emission, for which there are technical standards incorporated in Subpart D of this part, suitable for the simultaneous transmission of visual and aural television signals." Stations using double sideband AM emission systems have been type accepted and appear to be more conservative in their use of spectrum space than those using conventional FM emission.[13] We are accordingly proposing rules to permit authorization of stations of this type.[14]

CONCLUSION

13. Authority for the proposed rule making instituted herein is contained in Sections 4(i), 303 and 403 of the Communications Act of 1934, as amended.

14. All interested persons are invited to file written comments on the rule making proposals on or before December 15, 1972, and reply comments on or before December 29, 1972. In reaching a decision in this matter, the Commission may take into account any other relevant information before it, in addition to the Comments invited by this Notice.

15. In accordance with the provisions of Section 1.419 of the Commission's Rules and Regulations, an original and 14 copies of all comments, replies, pleadings, briefs, or other documents filed in this proceeding shall be furnished to the Commission. Responses will be available for public inspection during regular business hours in the Commission's Public Reference Room at its Headquarters in Washington, D.C.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

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[13] Stations using double sideband AM transmission are authorized to use 12.5 MHz bandwidth. Conventional FM stations in the CAR service have used 25 MHz.

[14] See Appendix B, Section 78.18(a)(4), 78.18(g), and 78.111(c). The channel assignment plan proposed would also be available for FM stations operating with an authorized bandwidth of 12.5 MHz.

APPENDIX A

Channel groups available for stations using vestigial sideband AM transmission under present Section 78.17(a)(2) of the Rules.

Group C	*Group D*
12,700.5–12,706.5	12,759.7–12,765.7
12,706.5–12,712.5	12,765.7–12,771.7
12,712.5–12,718.5	12,771.7–12,777.7
12,718.5–12,722.5	12,777.7–12,781.7
12,722.5–12,728.5	12,781.7–12,787.7
12,728.5–12,734.5	12,787.7–12,793.7
12,734.5–12,740.5	**12,793.7–12,799.7**
12,740.5–12,746.5	12,799.7–12,805.7
12,746.5–12,752.5	12,805.7–12,811.7
12,752.5–12,758.5	**12,811.7–12,817.7**
12,820.5–12,826.5	12,879.7–12,885.7
12,826.5–12,832.5	**12,885.7–12,891.7**
12,832.5–12,838.5	12,891.7–12,897.7
12,838.5–12,844.5	12,897.7–12,903.7
12,844.5–12,850.5	12,903.7–12,909.7
12,850.5–12,856.5	12,909.7–12,915.7
12,856.5–12,862.5	**12,915.7–12,921.7**
12,862.5–12,868.5	12,921.7–12,927.7
12,868.5–12,874.5	12,927.7–12,933.7
	12,933.7–12,939.7
	12,939.7–12,945.7

APPENDIX B

The following Rules are proposed for adoption:

Part 78 of Chapter I of Title 47 of the Code of Federal Regulations is amended in the following manner:

1. In § 78.18, paragraph (a)(2) is amended to revise the lists of Group C and Group D frequencies; subparagraph (a)(4) is added; paragraph (e) is revised; paragraphs (g) and (h) are redesignated as (j) and (k), respectively, and new paragraphs (g), (h), and (i) are added to read as follows:

§ 78.18 *Frequency assignments.*

(a) * * *

(2) * * *

Group C (MHz)	*Group D (MHz)*
12,700.5–12,706.5	12,759.7–12,765.7
12,706.5–12,712.5	12,765.7–12,771.7
12,712.5–12,718.5	12,771.7–12,777.7
12,718.5–12,722.5 [1]	12,777.7–12,781.7 [1]
12,722.5–12,728.5	12,781.7–12,787.7
12,728.5–12,734.5	12,787.7–12,793.7
12,734.5–12,740.5	12,793.7–12,799.7
12,740.5–12,746.5	12,799.7–12,805.7
12,746.5–12,752.5	12,805.7–12,811.7
12,752.5–12,758.5	12,811.7–12,817.7
12,758.5–12,760.5 [1]	12,817.7–12,819.7 [1]
12,760.5–12,766.5	12,819.7–12,825.7

[1] For transmission of pilot subcarriers, or other authorized narrow band signals.

Group C (MHz)	*Group D (MHz)*
12,766.5–12,772.5	12,825.7–12,831.7
12,772.5–12,778.5	12,831.7–12,837.7
12,778.5–12,784.5	12,837.7–12,843.7
12,784.5–12,790.5	12,843.7–12,849.7
12,790.5–12,796.5	12,849.7–12,855.7
12,796.5–12,802.5	12,855.7–12,861.7
12,802.5–12,808.5	12,861.7–12,867.7
12,808.5–12,814.5	12,867.7–12,873.7
12,814.5–12,820.5	12,873.7–12,879.7
12,820.5–12,826.5	12,879.7–12,885.7
12,826.5–12,832.5	12,885.7–12,891.7
12,832.5–12,838.5	12,891.7–12,897.7
12,838.5–12,844.5	12,897.7–12,903.7
12,844.5–12,850.5	12,903.7–12,909.7
12,850.5–12,856.5	12,909.7–12,915.7
12,856.5–12,862.5	12,915.7–12,921.7
12,862.5–12,868.5	12,921.7–12,927.7
12,868.5–12,874.5	12,927.7–12,933.7
12,874.5–12,880.5	12,933.7–12,939.7
12,880.5–12,886.5	12,939.7–12,945.7
12,886.5–12,892.5	
12,892.5–12,898.5	
12,898.5–12,904.5	
12,904.5–12,910.5	
12,910.5–12,916.5	
12,916.5–12,922.5	
12,922.5–12,928.5	
12,928.5–12,934.5	
12,934.5–12,940.5	
12,940.5–12,946.5	

Auxiliary Channels (MHz)

12,933.7–12,939.7	12,939.7–12,945.7

* * * * * * *

(4) For cable television relay stations using double sideband AM transmission and FM transmission requiring a necessary bandwidth of no more than 12.5 MHz:

Group I (MHz)	*Group J (MHz)*
12700–12712.5	12712.5–12725
12725–12737.5	12737.5–12750
12750–12762.5	12762.5–12775
12775–12787.5	12787.5–12800
12800–12812.5	12812.5–12825
12825–12837.5	12837.5–12850
12850–12862.5	12862.5–12875
12875–12887.5	12887.5–12900
12900–12912.5	12912.5–12925
12925–12937.5	12937.5–12950

* * * * * * *

(e) For cable television relay stations using vestigial sideband AM transmission, channels from only group C, only group D, only group C(2) or only group D(2) will normally be assigned a station. In situations where the number or the arrangement of channels available in either group is not adequate, or in

order to avoid potential interference, or in order to achieve the required VHF channelization arrangement on the CATV system, or for repeatered operation, or for two way transmission, or upon the showing of other good cause, the use of channels in Groups C and D, or in alternate Groups C or D, may be authorized. Applicants are encouraged to apply for adjacent channels within each group of channels, except that different channel arrangements may be authorized when required to conform to the required channelization arrangement at VHF on the CATV system, when it is necessary to transmit non-adjacent off-the-air channels or signals intended to fill non-adjacent slots in the spectrum, or to avoid potential interference, or upon other showing of good cause.

* * * * * * *

(g) For cable television relay (CAR) stations using double sideband AM transmission or FM transmission requiring a necessary bandwidth of no more than 12.5 MHz, channels from only Group I or Group J normally will be assigned a station, although upon adequate showing variations in the use of channels in Groups I and J may be authorized on a case-by-case basis in order to avoid potential interference or to permit a more efficient use. The use of channels in both Groups I and J may be authorized where the number of channels in one group is insufficient to accommodate the services proposed to be provided on the cable system, if the Commission finds that such use of channels in both groups is feasible and would serve the public interest.

(h) For double sideband AM transmission, the assigned visual carrier frequency for each channel listed in Group I or J shall be 6.25 MHz above the lower boundary frequency for each channel, and the side frequencies corresponding to the carrier frequency of the accompanying FM aural signal shall be 4.5 MHz above and below the visual carrier frequency.

(i) Unless frequency-division multiplexed/FM transmission is used, Local Distribution Service (LDS) stations, Studio to Headend Link (SHL) stations, Relay Pickup Stations, and other Cable Television Relay stations that are used for communication within the confines of a single cable television community shall employ no more than 12.5 MHz bandwidth per channel.

* * * * * * *

2. In § 78.103, paragraph (b) is amended to read as follows:

§ 78.103 *Emissions and bandwidth.*

* * * * * * *

(b) Any emission appearing on a frequency outside of the channel authorized for a transmitter shall be attenuated below the peak power of emission in accordance with the following schedule:

(1) For stations using other than vestigial sideband AM transmission:

(i) On any frequency above the upper channel limit and below the lower channel limit by between zero and 50 percent of the assigned channel width: At least 25 decibels;

(ii) On any frequency above the upper channel limit or below the lower channel limit by more than 50 percent and up to 150 percent of the assigned channel width: At least 35 decibels; and

(iii) On any frequency above the upper channel limit or below the lower channel limit by more than 150 percent of the channel width: At least $43+10 \log_{10}$ (power in watts) decibels.

* * * * * * *

3. Section 78.111 is amended by adding a new paragraph (c) to read as follows:

§ 78.111 *Frequency tolerance.*

* * * * * * *

(c) The frequency of the visual carrier of a station using double sideband AM transmission shall be maintained within 0.005 percent of the assigned frequency; the side frequencies corresponding to the carrier frequency of the accompanying aural signal shall be maintained 4.5 MHz ±1 kHz above and below the visual carrier frequency.

4. In § 78.115, paragraph (c) is added new to read as follows:

§ 78.115 *Modulation limits.*

* * * * * * *

(c) For stations that are authorized to use FM transmission with a bandwidth of 12.5 MHz, the total excursion of the radio frequency carrier under modulation shall not exceed 1.5 MHz and the maximum modulating frequency shall not be greater than 4.525 MHz.

APPENDIX C

The following amendment would achieve the de-structured channel approach suggested in the comments of the National Cable Television Association.

A substitute paragraph (k) for § 78.17 is suggested as follows:

(k) Notwithstanding the frequency assignment plans applicable to cable television relay (CAR) stations in paragraphs (a)(2) and (a)(4) above, Local Distribution Service (LDS) stations, Studio to Headend Link (SHL) stations, and Relay Pickup stations using either vestigial sideband or double sideband AM transmission may apply for any frequency assignment plan which is compatible with the frequency usage on the associated cable television system and which does not cause interference to existing authorized microwave systems. If either FM or FM/FDM transmission is used, the frequencies assignable to such stations shall conform to the plans listed in paragraphs (a)(1) and (a)(3), as applicable.

F.C.C. 72-972

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of AMENDMENT OF PART 76, SUBPART G, OF THE COMMISSION'S RULES AND REGULATIONS PERTAINING TO THE CABLECASTING OF PROGRAMS FOR WHICH A PER-PROGRAM OR PER-CHANNEL CHARGE IS MADE.	Docket No. 19554

ORDER

(Adopted November 1, 1972; Released November 2, 1972)

BY THE COMMISSION: COMMISSIONERS ROBERT E. LEE AND WILEY CONCURRING IN THE RESULT; COMMISSIONER H. REX LEE ABSENT; COMMISSIONER HOOKS NOT PARTICIPATING.

1. By "Motion for Further Extension of Time" filed October 26, 1972, the National Association of Theatre Owners, Inc., has requested a further extension of time, until November 15, 1972, for filing comments and until December 1, 1972, for the filing of reply comments in the above-captioned proceeding. In support of its request NATO indicates that it plans to submit lengthy comments with extensive supporting data, that information is being collected from motion picture theatres throughout the United States, and that the data and comments will not be ready for submission to the Commission in time to meet the existing November 1 deadline.

2. Under the existing time schedule interested persons have had more than three months for the submission of comments responsive to the *Notice of Proposed Rule Making* in this proceeding. By Order adopted September 27, 1972 (FCC 72-854), we granted a one-month extension of time in response to a request by the National Association of Theatre Owners for additional time. A longer extension, although requested, was not granted because of our interest in bringing this proceeding to an expeditious resolution. The inability of the National Association of Theatre Owners to meet this time schedule is due to matters under their control. We find, therefore, no good cause for granting the extension requested. Not only would a further extension delay conclusion of this proceeding, but it would not be fair to other parties who have adhered to the time schedule. We will, accordingly, deny the requested time extension. Should the National Association of Theatre Owners wish in any event to file after the established deadline, their comments and supporting data will be given such considera-

tion as time permits. We do not, however, intend to delay commencement of our consideration of this matter until these comments are received.

Accordingly, IT IS ORDERED, That the "Motion for Further Extension of Time" filed October 26, 1972, by the National Association of Theatre Owners, Inc., IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Request by
LAUREN A. COLBY, WASHINGTON, D.C.
For Ruling

NOVEMBER 2, 1972.

LAUREN A. COLBY, Esq., *1026–17th Street, N.W., Washington, D.C. 20036*

DEAR MR. COLBY: This is in response to your letter of October 5, 1972 inquiring whether it would violate the Commission's rules for you to contact an individual Commissioner and request an appointment for a meeting relating to a case pending before the Commission. You also inquire whether such a meeting could be arranged with the Chief of the Office of Opinions and Review. Your letter indicates that you would give reasonable notice (twenty-four hours) to the Broadcast Bureau in order to permit its representatives to attend the meeting. You further indicate that your client is interested in purchasing the facilities of a bankrupt licensee whose renewal applications has been denied and that the receiver in bankruptcy for the licensee is interested in meeting with individual Commissioners as soon as possible.

As you are aware, the proceeding involved in Docket No. 19067 is an adjudicatory proceeding and there is now pending before the Commission a petition for reconsideration of the Commission's denial of the station's application for renewal.

The Commission's rules do not permit holding meetings of this nature under the existing circumstances. If there is any information to be brought to the Commission's attention, it should be submitted in accordance with the Commission's rules for filing pleadings in adjudicatory matters.

Sincerely yours,

JOHN M. TORBET, *Executive Director.*

F.C.C. 72-941

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Request by
COMMUNICATIONS SATELLITE CORP.
For Authorization To Proceed With
Launch of the Intelsat IV (F-7)

OCTOBER 18, 1972.

COMMUNICATIONS SATELLITE CORP.
950 L'Enfant Plaza South, S.W.
Washington, D.C. 20024

Attention: Mr. George P. Sampson, Vice President, Communications Systems Management.

In Re: INTELSAT IV (F-7) Launch, Positioning and Testing.

GENTLEMEN: This is in reply to your letter of September 26, 1972, and a filing dated September 27, 1972, correcting that letter in which you request such authority as may be necessary to proceed with the launch of the INTELSAT IV (F-7), positioning of it in the Pacific, and testing of it as described therein.

You inform us that the results of in-plant acceptance tests of the F-7 satellite, completed on July 6, 1972, confirm that the technical characteristics of the satellite conform to the specifications contained in the Commission's Memorandum Opinion and Order of September 25, 1968 (File No. 7-CSS-P-69). You also inform us that the satellite will be operated within the parameters contained in the Commission's Memorandum Opinion and Order of April 19, 1968 (File Nos. 9-CSS-MP-70 and 11-CSS-MP-70).

You further state in your letter that: (1) The satellite is presently in storage in Delaware; (2) it will be shipped in November to Cape Kennedy; (3) the launch is presently scheduled to take place on or about December 12, 1972; and (4) the F-7 is planned for positioning in the Pacific region at 179 degrees East Longitude as an operational spare for that region.

Upon review of the relevant correspondence [1] and associated data, the Commission concludes that the public interest will be served by

[1] On October 6, 1972, the Commission received a filing from Hawaiian Telephone Company (HTC) commenting on Comsat's request to launch, position and test the IV (F-7). In this filing, HTC suggests that should it be determined that the reliability of the III (F-4) is so low as to necessitate its replacement, consideration should be given to its immediate retirement from service. In response, by letter dated October 16, 1972, Comsat states that discussion of the accounting procedure for the III (F-4) is not relevant to a launch request for the IV (F-7) since the launch of a new satellite is not and should not be contingent upon the accounting treatment of a previous satellite and because the future status of the III (F-4) is not clear.

a grant of the subject request; and, therefore, Comsat is authorized to participate in the launch and testing program of the INTELSAT IV (F–7) satellite subject to the following terms and conditions:

1. This authorization is contingent upon the National Aeronautics and Space Administration's informing the Commission prior to launch, pursuant to the provisions of Section 201(b)(1) of the Communications Satellite Act of 1962, that it concurs in the launch date and that a technical review indicates the F–7 is capable of performing its intended functions.

2. This authorization is subject to the terms and conditions contained in the Commission's Memorandum Opinion and Order adopted on October 18, 1972, relating to Commission authorization for Comsat's participation in the construction of the F–7.

3. This authorization shall not be construed as authority for Comsat to enter into their books of account for rate-making purposes their proportionate share of the estimated costs of the F–7 spacecraft and associated engineering changes indicated in Comsat's letter of September 26, 1972, insofar as such costs exceed the costs authorized for such satellite construction in the Commission Memorandum Opinion and Order adopted on October 18, 1972.

4. This authorization is limited to the described program including the positioning of the IV (F–7) satellite at 179 degrees East Longitude. Any change in the authorized location due to a launch delay or other circumstances will be considered upon an appropriate request by Comsat for authority to participate in any such program change.

5. Comsat shall not furnish channels of communications for commercial service via the INTELSAT IV (F–7) satellite until specific authorization therefor shall have been granted by the Commission upon appropriate application.

6. Comsat shall provide the Commission with weekly summary reports concerning progress of the testing program and upon request shall make the detailed test data available. The Commission may at its discretion require additional tests to be conducted.

7. Conduct of the program authorized herein shall be without interruption of commercial satellite service now authorized at the U.S. earth stations.

8. Neither this authorization nor any right granted herein shall be assigned or otherwise transferred without approval of this Commission.

9. Unless extended or modified for good cause, this authorization shall terminate on January 12, 1973, or on such earlier date as commercial operations may be authorized.

Commissioners Johnson and Reid concurring in the result.

By Direction of the Commission,
Ben F. Waple, *Secretary.*

F.C.C. 72-946

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of
AMENDMENT OF PART 0, RULES AND REGULATIONS

MEMORANDUM OPINION AND ORDER

(Adopted October 26, 1972; Released October 31, 1972)

BY THE COMMISSION: COMMISSIONER JOHNSON DISSENTING.

1. Requests for the extension of time in which to file briefs, comments, pleadings, and all other papers relating to broadcast matters which have not been designated for hearing are ordinarily non-controversial and require prompt action, which can most appropriately and efficiently be taken by the Bureau Chief rather than the Commission. This is true with regard to matters such as rule making, forfeitures, or applications for review, which will be acted upon by the Commission, as well as with regard to matters which will be acted upon by the Bureau Chief. Accordingly, we are amending Section 0.281 to make it clear that Chief, Broadcast Bureau, has full authority to act on all such requests.

2. In proceedings which are before the Chief, Common Carrier Bureau, for preparation of a recommended decision, it is appropriate for the Bureau Chief to act on requests for the extension of time to file pleadings. Accordingly, we are amending Section 0.303 to reflect such authority.

3. The amendments to the rules are set out in the attached Appendix. Authority for these amendments is contained in Sections 4(i), 5(d) and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. 154(i), 155(d) and 303(r). Because the amendments are procedural in nature and relate to matters of internal organization, the prior notice and effective date provisions of 5 U.S.C. 553 are inapplicable.

4. In view of the foregoing, IT IS ORDERED, effective November 7, 1972, That Sections 0.281 and 0.303 of the Rules and Regulations are amended as set out in the Appendix hereto.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

APPENDIX

Part 0 of Chapter I of Title 47 of the Code of Federal Regulations is amended as follows:

1. Section 0.281(d)(8) is revised to read as follows:

§ 0.281 *Authority delegated.*

• • • • • • •

(d) * * *

(8) For the extension of time in which to file briefs, comments, pleadings, and all other papers, including papers relating to matters which are to be decided by the Commission, such as applications for review of actions taken by the Chief, Broadcast Bureau, and including situations in which the filing date was initially specified by the Commission.

• • • • • • •

2. Section 0.303(h) is added to read as follows:

§ 0.303 *Authority concerning extension of time and waivers.*

• • • • • • •

(h) For the extension of time in which proposed findings, briefs, and pleadings may be filed in proceedings which are before the Chief, Common Carrier Bureau, for preparation of a recommended decision.

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Complaint by
GORDON L. EVANS, BARTON, N.Y.
Concerning Fairness Doctrine Re Station
WNBF, Binghamton, N.Y.

OCTOBER 16, 1972.

MR. GORDON L. EVANS,
R.D. 1, Box 28B, Barton, N.Y. 13734

DEAR MR. EVANS: This will refer to your letter of August 26, 1972 concerning the editorial presentations of Television Station WNBF, Binghamton, New York, on "gun control." You are apparently alleging that the station's editorials do not comply with the fairness doctrine because "the 'editorial' presentations of WNBF–TV do *not* coincide with the public interest."

As stated in the Commission's previous letter to you, the fairness doctrine provides that if a station presents one side of a controversial issue of public importance, it is required to afford reasonable opportunity for the presentation of contrasting views. It is the right of the public to be informed which the fairness doctrine is designed to assure, rather than the right of any individual to broadcast his views. In determining whether or not a station has complied with the fairness doctrine, the Commission takes into account the station's overall programming to see if significant contrasting views have been presented.

It is noted that your letter of July 20, 1972 to the Commission enclosed a copy of a letter to you, dated May 31, 1972, from Mr. George R. Dunham, General Manager, WNBF–TV. Mr. Dunham stated therein that "In view of the fact that Mr. Luther E. Brown of the South Appalachian Rifle and Pistol Club has already appeared on our air three times in editorial opposition to gun controls, was part of a panel during a 30-minute public affairs program on the same subject (along with Mr. Gent) and will editorialize again over WNBF–TV in accordance with arrangements now being completed, I believe WNBF–TV's responsibility to present opposing views has been properly discharged." It would appear from Mr. Dunham's statement that WNBF–TV has presented, and has further plans to present, significant contrasting views with respect to the station's editorials on "gun control."

Your letter of July 20 to the Commission also enclosed a copy of a WNBF–TV editorial broadcast on May 25 and 26, 1971 which stated, in part, that "A correspondent who objects to our stand on gun controls asks us—and we quote—'*exactly how*' our proposal would have prevented the shooting of Governor Wallace. The question is an absurdity, of course, since there is no possible way to reconstruct *what*

sequence of events *would* have taken place *if* Governor Wallace's attacker had not been able to get his hands on a gun. Our argument for gun control rests on the laws of probability—the fewer guns around, the less chance of their falling into the hands of misfits, psychopaths and other fools." Your letter of July 20 states that the charge of absurdity was leveled at you since you wrote the letter referred to in the station editorial. Within the context of the fairness doctrine the Commission has promulgated the personal attack rule which states that when, during the presentation of views on a controversial issue of public importance, an attack is made upon an identified person or group, it is the duty of the licensee to notify the person or group attacked, to send a recording, transcript or as accurate a summary as possible, and to afford an opportunity for a response. A copy of the pertinent Commission rule is enclosed. Please note that mere mention of a person or group, or even certain types of unfavorable references thereto, do not constitute personal attacks as defined by the Commission. A personal attack, for the purposes of the Commission's Rules, is an attack "upon the honesty, character, integrity or like personal qualities of an identified person or group." It is also noted that in the station editorial you were not identified and it was the question, not you, which was characterized by the station as an "absurdity". In a letter to you, dated June 29, 1971, a copy of which was enclosed with your letter of July 20 to the Commission, Mr. Dunham pointed out that "you are not the subject of a charge of absurdity in my editorial of May 25 and 26 and that you are in no way identified in that editorial." Thus, it appears clear that the personal attack rule does not apply with respect to that particular editorial of the station.

Since WNBF–TV has presented significant contrasting views to its editorial position on "gun control", has plans to continue doing so, and since the personal attack rule does not appear to apply to the particular station editorial of May 25 and 26, 1972, no further Commission action is warranted at the present time.

Staff action is taken here under delegated authority. Application for review by the full Commission may be requested within 30 days by writing the Secretary, Federal Communications Commission, Washington, D.C. 20554, stating the factors warranting consideration. Copies must be sent to the parties to the complaint. See Code of Federal Regulations, Volume 47, Section 1.115.

Sincerely yours,

WILLIAM B. RAY, *Chief,*
Complaints and Compliance Division
for Chief, Broadcast Bureau.

109-015—72——3

F.C.C. 72-892

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Request by
DIRECTOR, OFFICE OF TELECOMMUNICATIONS POLICY, EXECUTIVE OFFICE OF THE PRESIDENT
Concerning Use of Government Frequencies by Common Carriers

OCTOBER 5, 1972.

Hon. CLAY T. WHITEHEAD
Director, Office of Telecommunications Policy,
Executive Office of the President,
Washington, D.C.

DEAR DR. WHITEHEAD: This is in response to the letter of June 14, 1972, from Mr. W. Dean, Jr. to Mr. Raymond E. Spence concerning the use of Government frequencies by common carriers and requesting the Commission's views with regard to guidelines for such use which are developed by the Interdepartment Radio Advisory Committee (IRAC) in response to the Commission's public notice of February 4, 1971 (FCC 71-106).

These guidelines read:

> The following guidelines are to assist in the determination of whether or not a station belongs to and is operated by the United States as specified in Section 305(a) of the Communications Act of 1934:
>
> a. The department or agency concerned should be able to exercise effective control over the radio equipment and its operation; and
>
> b. The department or agency concerned assumes responsibility for contractor compliance with Executive Branch, departmental, or agency instructions and limitations regarding use of the equipment and ensures that such instructions and limitations are met when operating under the authority of an Executive Branch frequency authorization to the department or agency; and
>
> c. The station should be operated by an employee of the department or agency or by a person who operates under the control of the department or agency on a contractual or cooperative agreement basis, and who is under supervision of the department or agency sufficient to ensure that Executive Branch, departmental, or agency instructions and limitations are met.
>
> It is recognized that a Government agency may make a contract arrangement for maintenance or operation of a radio station under its control without diminishing the effective control of, or responsibility for, such station, provided the appropriate limitations or requirements are specified.
>
> Since the foregoing may not cover every case, or where there may be doubt, the determination will be made by the department or agency concerned after consultation with the OTP/FCC as appropriate.

We believe that these guidelines, which would be distributed to Federal agencies, are consistent with the Commission's policy in this matter and are adequate for the purpose of assisting in determining whether or not a station belongs to and is operated by the United States within the meaning of Section 305(a) of the Act. Accordingly, we concur in the guidelines for the purposes stated.

BY DIRECTION OF THE COMMISSION,
DEAN BURCH, *Chairman.*

F.C.C. 72-939

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Applications of GRENCO, INC., GREENWOOD, S.C. For Renewal of License of Station WCRS and WCRS-FM, Greenwood, S.C.	Docket No. 19176 File Nos. BR-1137, BRH-1674
and	
RADIO GREENWOOD, INC., GREENWOOD, S.C. For Renewal of License of Station WGSW, Greenwood, S.C.	Docket No. 19177 File No. BR-2821

MEMORANDUM OPINION AND ORDER

(Adopted October 18, 1972; Released October 20, 1972)

BY THE COMMISSION:

1. The Commission has before it for consideration: (a) the Initial Decision in this proceeding, FCC 72D-19, released March 14, 1972; (b) exceptions and ancillary pleadings filed by Radio Greenwood, Inc., United Community Enterprises, Inc., and the Chief, Broadcast Bureau; and (c) a Petition for Severance and Grant filed on June 7, 1972, by Grenco, Inc., and oppositions thereto filed on June 14, 1972, by the Chief, Broadcast Bureau, and on June 21, 1972, by Radio Greenwood, Inc.

2. In its petition for severance and grant, Grenco asserts that the Examiner proposed the grant of its renewal applications and that none of the parties have filed exceptions to that aspect of his decision. It also contends that its owner is 78 years old and in poor health and that the denial of its petition will result in extensive delays before a final grant. We believe, however, that Grenco's petition must be denied. A grant would require the separate consideration of the Initial Decision and exceptions in an unwarranted departure from established procedures. *Charles J. Lanphier* 20 RR 1077 (1960). Moreover, we deem Grenco's continued participation to be necessary in light of the conflicting testimony of George B. Cook, Jr., a principal of Radio Greenwood, and Dan Crosland, general manager of Grenco, since the resolution of that conflict is of decisional significance.

3. Radio Greenwood has requested an opportunity to present oral argument and that request will be granted. We believe, however, that one matter raised on appeal merits special comment. In his Initial Decision, the presiding Administrative Law Judge held that Cook "seriously and substantially perjured himself in respect to material matters testified to in this proceeding" (Conclusions, par. 39). Radio

Greenwood points out, however, that no character issue against it was designated in this proceeding and it contends that any consideration of the applicant's character qualifications in the disposition of this case would be a gross violation of due process. In order to aid the Commission in the resolution of the issue thus raised, the parties are directed to include in their oral presentation a discussion of the following questions:[1]

(a) Whether the evidence of record establishes that the principals of Radio Greenwood, Inc., or any of them, knowingly and willfully gave false testimony as to material matters at the hearing of this docketed proceeding.

(b) Whether the Commission is precluded as a matter of law from considering whether Radio Greenwood, Inc. possesses the requisite character qualifications to continue as a licensee of a broadcast facility unless a character issue is designated and a further evidentiary hearing is held with respect thereto; or, if not so precluded, whether a further evidentiary hearing would serve any useful purpose.

(c) Whether, on the basis of the evidence presently of record, Radio Greenwood, Inc. possesses the requisite character qualifications to continue as a Commission licensee.

(d) Whether, in view of all of the evidence of record, a grant of the application for renewal of license of Station WGSW filed by Radio Greenwood, Inc. would serve the public interest, convenience and necessity.

4. Accordingly, IT IS ORDERED That the Petition for Severance and Grant, filed June 7, 1972, by Grenco, Inc., IS DENIED.

5. IT IS FURTHER ORDERED:

(a) That oral argument IS SCHEDULED before the Commission, *en banc*, on December 19th, 1972 at 9:30 a.m.

(b) That, subject to the filing of a written notice of intention to appear and participate within five (5) days after the release of this Order, the parties ARE AUTHORIZED to present oral argument as follows:

Radio Greenwood, Inc.—30 minutes.
Grenco, Inc.—5 minutes.
United Community Enterprises, Inc.—5 minutes.
Chief, Broadcast Bureau—30 minutes.

(c) That Radio Greenwood, Inc., MAY RESERVE part of its time for rebuttal.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

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[1] See *WDUL Television Corp.*, 34 FCC 1027 (1963).

F.C.C. 72-949

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re: ILLINOIS COMMERCE COMMISSION Petition for Special Relief Filed Pursuant to Section 76.7 of the Commission's Rules	CSR-222

MEMORANDUM OPINION AND ORDER

(Adopted October 26, 1972; Released October 30, 1972)

BY THE COMMISSION:

1. On July 17, 1972, the Illinois Commerce Commission filed an "Application for Special Relief Respecting Cable Television Systems in the State of Illinois" pursuant to Section 76.7 of the Rules.[1] The ICC requested the following relief: (1) that the Commission suspend all processing of applications for certificates of compliance and petitions for special relief relating to cable systems in Illinois; (2) that the Commission notify such Illinois cable operators that they must show proof of service on the ICC and extend the deadline for the ICC to file comments or opposition until thirty days after proof of service; and (3) that in cases where the cable system was neither in operation nor substantially constructed on or before May 5, 1972, the Commission deny the authority of the system to carry broadcast signals unless the system acquires either a waiver from the ICC or there is a dissolution or expiration of a local stay.

2. The facts which led to the present petition arise from a "local jurisdictional dispute" such as the Commission discussed in Paragraph 117 of *Reconsideration of Report and Order in Docket No. 18397*, FCC 72-530, 36 FCC 2d 326. On September 9, 1971, the ICC issued an *Interim Opinion and Order in Docket 56191* and therein asserted regulatory jurisdiction over Illinois cable television systems. The ICC ordered that no new cable construction be undertaken pending the completion of proceedings and the adoption of specific rules unless the cable system obtains a waiver from the ICC. On April 17, 1972, the Circuit Court for McHenry County (Illinois) ruled that the ICC lacked legal authority to exercise regulatory jurisdiction over cable. However, on May 5, 1972, the Circuit Court issued an order staying the effect of its own judgment and directed all Illinois cable systems to comply with the ICC's *Interim Order*. The Illinois Supreme Court has authorized a direct appeal on the issue of the ICC's jurisdiction to regulate cable and a decision is expected early in 1973. In the

[1] Section 76.7 refers to a "petition" for special relief; we are treating the present "application" as a "petition."

meantime, Illinois cable systems which were not in operation or substantially constructed on or before May 5, 1972, may not undertake new construction unless they obtain waivers from the ICC.

3. The ICC's petition was opposed by the Illinois-Indiana Cable Television Association. Oppositions and comments were filed by the operators of several Illinois cable systems, most of whom have applications for certificates of compliance pending before the Commission. The latter can be divided into four categories:

(a) Systems which were in operation or substantially constructed on or before May 5, 1972, and which served the ICC with copies of their application for certificate of compliance. As to these applicants the ICC has acquiesced in its request for special relief.

(b) Systems which were in operation or substantially constructed on or before May 5, 1972, but which have not served copies of their applications for certificate of compliance on the ICC. Apparently the ICC will acquiesce in its petition as to these applicants if they serve the ICC.

(c) Systems which were not in operation or substantially constructed on or before May 5, 1972, but which have procured waivers from the ICC.

(d) Systems which were not in operation or substantially constructed on or before May 5, 1972, and have not procured waivers from the ICC. Some of these have applied for and been denied ICC waivers; some have not applied.

4. On August 16, 1972, the Steering Committee of the Federal-State/local Advisory Committee adopted a pertinent resolution as follows:

STATE-LOCAL FRANCHISING DISPUTES

The Steering Committee of the FSLAC has discussed the administrative and other problems presented by Paragraph 117 of the FCC's *Reconsideration of Report and Order*, 37 Fed. Reg. 13848, 13863 (July 14, 1972), in an effort to reconcile the diverging views of the cable industry and of those engaged in disputes over franchising authority between State and municipal bodies. The following formulation has been arrived at by a process of negotiation and accommodation, as a reasonable compromise proposal for consideration by the Commission:

In cases arising under Paragraph 117—

(1) The Commission should assure service of applications for certificates of compliance on contending authorities as proposed in Paragraph 117, and allow the full 30 days for responsive filings.

(2) Applications in this category should be processed by the Commission in normal sequence.

(3) If there is an order or other provision of State or local law imposing a stay or moratorium on construction or operation of new or existing cable systems, the Commission should condition the effectiveness of its certificates of compliance on a demonstration of compliance with that specific provision of local law.

5. The ICC, in its "Reply to Opposition filed by Illinois-Indiana Cable Association," modified its request for relief to conform to the resolution formulated by the FSLAC.

6. We feel that the proposal of the FSLAC is a just and reasonable solution to the problem at hand.[2] Several states have begun or are planning to begin regulation of cable. Inevitably, there is a period in which the extent or legality of state regulation is before the state courts. Section 76.31(a) of the Cable Rules requires an applicant for certificate of compliance to have "a franchise or other appropriate authorization." The issue before the Illinois courts is not whether the cities may grant franchises but whether the State may impose additional regulations.[3] Thus, there is no reason for the Commission to delay the processing of applications for certificates of compliance in cases where the applicant meets our requirements and there is no other objection. We do not wish to impose on cable operators the burden of consecutive delays while they deal with first the state then with federal jurisdictions. On the other hand, we do not wish to encourage cable operators to disregard local stay orders. Hence, we will condition the effectiveness of our certificates of compliance on a demonstration of compliance with local law. For example, the applicant might submit a statement from the ICC or any other appropriate body showing either compliance with the terms of the stay order or that the order has been vacated.

Accordingly, IT IS ORDERED, That, until final determination by the Illinois Supreme Court of whether the Illinois Commerce Commission has jurisdiction over cable television, we will deal with applications for certificates of compliance from Illinois cable systems in normal sequence and in the following manner:

(a) Applications from systems which were in operation on or before May 5, 1972, and which otherwise comply with the Cable Rules, will be granted unconditionally.

(b) Applications from systems which were not in operation on or before May 5, 1972, and which otherwise comply with the Cable Rules, will be granted conditionally on a showing of compliance with local law in accordance with paragraph 6 above.

IT IS FURTHER ORDERED, That the "Application for Special Relief Respecting Cable Television Systems in the State of Illinois," filed July 17, 1972, by the Illinois Commerce Commission, IS GRANTED to the extent indicated above and otherwise IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

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[2] A modification of the Cable Rules to assure service of the applications on state authorities with jurisdiction over cable was adopted by Commission action on October 18, 1972.

[3] In some states which assert regulatory jurisdiction over cable, the ultimate result is local regulation of some aspects of cable and state regulation of others. In other states the result is total state preemption and no local regulation.

F C.C. 72R-311

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of	
APPLICATION OF LOREN R. MCQUEEN, D.B.A. MARITIME COMMUNICATIONS SERVICE FOR A CONSTRUCTION PERMIT FOR A NEW PUBLIC CLASS III-B COAST STATION TO BE LOCATED AT MT. UMUNHUM NEAR ALMADEN, CALIF.	Docket No. 19006 File No. 4900-M-P-48
APPLICATION OF WESTERN CALIFORNIA TELEPHONE COMPANY FOR A CONSTRUCTION PERMIT FOR A NEW PUBLIC CLASS III-B COAST STATION TO BE LOCATED NEAR SANTA CRUZ, CALIF.	Docket No. 19008 File No. 5427-M-P-98
APPLICATION OF SALINAS VALLEY RADIO TELEPHONE COMPANY FOR A CONSTRUCTION PERMIT FOR A NEW PUBLIC CLASS III-B COAST STATION TO BE LOCATED NEAR PEBBLE BEACH, CALIF.	Docket No. 19009 File No. 770-M-L-40

APPEARANCES

Arthur W. Brothers, (a partner) on behalf of Maritime Communications Service; *Timothy D. Fitzpatrick*, *A. M. Hart* and *H. Ralph Snyder, Jr.*, on behalf of Western California Telephone Company; *Harold Mordkofsky*, *Phillips B. Patton* and *Jeremiah Courtney*, on behalf of Salinas Valley Radio Telephone Company; *Dudley A. Zinke*, *George A. Sears* and *Frank Sieglitz*, on behalf of The Pacific Telephone and Telegraph Company; *Rufus G. Thayer*, on behalf of the California Public Utilities Commission; and *Terrance P. O'Brien*, on behalf of the Chief, Safety and Special Radio Services Bureau, Federal Communications Commission.

DECISION

(Adopted October 30, 1972; Released November 1, 1972)

BY THE REVIEW BOARD: BERKEMEYER, PINCOCK AND KESSLER.

1. This proceeding arose upon the applications of Maritime Communications Service (MCS), of Western California Telephone Company (Western), and of Salinas Valley Radio Telephone Company (Salinas), each requesting a construction permit to establish new Class III-B public coast stations to portions of the California seacoast including the San Francisco-Oakland area in the north, and the Monterey-Pebble Beach area in the south. Both MCS and Salinas seek the use of Channel 28. Western seeks the use of two channels, namely,

Channels 24 and 27. The Commission designated the applications for consolidated hearing on various issues [1] including an issue relating to the extent of interference between the MCS proposal and existing public coast Station KGW–464, which operates at Vacaville, California, on Channel 28. This interference issue requires a determination of whether such interference would be tolerable or mutually destructive.[2]

2. On November 9, 1971, after hearing, Administrative Law Judge Frederick W. Denniston released an Initial Decision (FCC 71D–84), recommending (a) a grant of the applications of Western for Channel 27, and of Salinas for Channel 28, and (b) a denial of Western's request for Channel 24, and of the application of MCS for Channel 28. The Presiding Judge found and concluded, among other matters, that (a) the MCS and Salinas proposals would result in mutually destructive electrical interference and were mutually exclusive; (b) the MCS proposal would substantially overlap existing Station KGW–464, Vacaville, and "being on the same channel, would presumably cause destructive electrical interference throughout the entire area of overlap"; and (c) mutually destructive electrical interference would exist between the MCS station and KGW–464 in major portions of San Pablo and at least in the northern portion of San Francisco Bay. The Presiding Judge concluded, in effect, that the MCS application must be denied because of the objectionable interference to KGW–464, and he grounded his denial of the MCS application on this ground, standing alone, and without regard to the other issues in this proceeding relating to MCS. Stated another way, the Presiding Judge reached findings of fact with respect to the other issues relating to MCS, but did not resolve them because of the required denial of the MCS application on the grounds of objectionable interference to KGW–464.

3. Other than MCS, no other party to the proceeding filed substantive exceptions to the Initial Decision. However, the People of the State of California and the Public Utilities Commission of the State of California did file one *pro forma* type of exception requesting that the grants proposed by the Initial Decision be conditioned on the grantees "securing an appropriate or required authorization from the California Public Utilities Commission." [3] In all other respects the parties, other than MCS, support the Initial Decision.

4. Oral argument on MCS' exceptions was held on September 28, 1972. We have reviewed the Initial Decision in light of these exceptions and oral argument and our examination of the record. Succinctly stated, we agree, in substance, with the Presiding Judge's conclusion that the MCS application must be denied because of the mutually destructive interference it would cause to existing Station KGW–464. For this reason, we, like the Presiding Judge, need not, and do not, reach the remaining issues in this proceeding with respect to MCS. We also agree with the Presiding Judge that public interest, convenience,

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[1] The issues are set forth in para. 1 of the Initial Decision and will, therefore, not be repeated here.

[2] The burden of proof on Issue (g) (the interference issue) was placed on MCS, although the burden of proof relating to the extent of overlap of KGW–464 and the proposed MCS operation was placed on The Pacific Telephone and Telegraph Company, licensee of KGW–464, a protestant in this proceeding.

[3] This request will be granted as shown by the "Ordering clause."

and necessity would be served by the grant of the applications of Western for Channel 27 and of Salinas for Channel 28, and by the denial of the application of MCS for Channel 28 and of Western's request for Channel 24.[4] Except as modified in the Rulings on Exceptions contained in the attached Appendix, and by our discussion below, we concur with the Presiding Judge's findings of fact and conclusions, and hereby adopt[5] the Initial Decision. As will be shown in greater detail below, our only substantial difference with the Presiding Judge concerning the MCS proposal stems from the fact that on the basis of our examination of the record we find that the extent of interference caused by the MCS proposal to KGW–464 is more severe and extensive than that reflected in the Initial Decision. We also explicitly, rather than implicitly as did the Presiding Judge, find and conclude that no weight whatsoever can be accorded to the random type listening tests used by MCS in an effort to rebut KGW–464's showing depicting the extent of the overlapping contours. In this connection, it is emphasized that KGW–464's showing is based upon a theoretical method of computation which was agreed upon by MCS, and all other other parties to this proceeding, at a prehearing conference, and which is the subject of a stipulation of record. As we view this case, the sole question presented is whether MCS after agreeing by stipulation to a theoretical method of depicting overlapping contours is, nevertheless, in a position to insist that unacceptable so-called listening tests take precedence over theoretical calculations. We think not, for reasons more fully set forth below.

5. Briefly stated, the pertinent facts are these: As indicated above, MCS and Salinas each propose to operate on Channel 28, the channel presently utilized by Pacific's Station KGW–464, Vacaville, California. In order to determine the extent of existing and proposed service areas and the extent, if any, of interference, the parties agreed upon certain stipulations during a prehearing conference on November 6, 1970 (FCC 70M–1602, released November 23, 1970), which, in part, may be described, as follows: (a) the service area is that area within which a signal at the receiver antenna terminals is at least −130 dBW, computed in accordance with the methodology described in the Notice of Proposed Rule Making, Docket No. 18944; (b) destructive co-channel interference occurs if the desired-to-undesired signal ratio is 12 dB, or less; (c) shadow losses are to be considered in computing the coverage areas; and (d) a gain factor is to be used for antenna heights above 1,000 feet.

6. The KGW–464 site is located about 41 miles northeast of San Francisco. The KGW–464 service area, based upon the facts adduced pursuant to the above described stipulations, extends southward across San Francisco Bay to approximately midway between the San Mateo-Hayward and Dumbarton bridges. The KGW–464 −130 dBW contour, including shadow losses, extends 79 miles east, 75 miles south-

[4] Western did not file exceptions to the denial of its request for Channel 24. Hence, there will be no further discussion of Western's request for Channel 24. See Section 1.276(f) of the Commission's Rules.

[5] The Board is under direction from the Commission to expedite the issuance of a decision. See FCC 72–367, 34 FCC 2d 591 (1972).

east, 54 miles south, 45 miles southeast, and 28 miles west. This places the KGW–464 service area over most of San Francisco Bay, the Golden Gate, San Pablo Bay, San Pablo Strait, and other inland waterways into Sacramento. The southern portion of this contour would fall about 26 miles north of the proposed MCS site. (Pacific Exh. 6, Attachment A.) The MCS −130 dBW contour would extend 29 miles northeast, 35 miles north, 84 miles northwest, 84 miles west (out into the Pacific Ocean), 88 miles southwest, and 82 miles south. (Shadow losses were only included in calculations for the north and northeast.) The KGW–464 and the proposed MCS service area contours overlap over areas which include San Pablo Bay, San Pablo Strait, the Golden Gate and all of San Francisco Bay served by KGW–464. In the north-south direction, the MCS proposed service contour would overlap the service contour of existing Station KGW–464 for a distance of approximately 40 miles. In the east-west direction, the service contours would overlap for a maximum distance of approximately 40 miles. It is pertinent to note at this point that none of the parties challenged the accuracy of the foregoing showings of contour placement and of overlap based on the methods set forth in the accepted stipulations. MCS, however, on the basis of listening tests (which will be discussed in more detail *infra*) did challenge the validity of locating contours by the methodology agreed to in the stipulations.

7. Pacific depicted the potential interference that would be caused to KGW–464 by selecting ten points within the KGW–464 service area at which the signal ratios of the KGW–464 and MCS operations were calculated. The selected points are located in San Pablo Bay, San Pablo Strait and North San Francisco Bay. KGW–464 would experience interference at seven of the ten points. The three points where no interference would be involved are located in the San Pablo Bay. Based on these calculations, KGW–464 would experience interference throughout its service area in the San Francisco Bay.[6] This area of interference extends from approximately the 38 degree parallel in San Pablo Bay south throughout the major part of San Francisco Bay, which includes the San Pablo Strait and the Golden Gate (Pacific Exh. 6). This is an important part of the KGW–464 service area because vessels which travel to or from the Stockton and Sacramento areas through San Pablo Bay and San Pablo Strait use the KGW–464 facilities. MCS admitted that vessels in the San Pablo Bay would not be able to communicate with KGW–464 due to interference from the MCS station. McQueen, a partner of MCS, testified that there would be a zone of mutually destructive interference in "approximately" the San Pablo Bay and the northern part of San Francisco Bay.

8. Pacific's studies were concerned with interference which the MCS proposal would cause KGW–464. The record does not contain any showing of the interference which KGW–464 would cause the MCS operation. However, MCS did state that KGW–464 places a sufficient signal into the northern end of San Francisco Bay and San Pablo

[6] San Francisco Bay is to the south of most of the calculated points; and moving southward, the distance increases to KGW–464 and decreases to the MCS site. As a result, the desired-to-undesired signal ratio decreases from that already determined to be less than 12 dB.

Bay so that vessels attempting to communicate with the proposed MCS station would experience interference from KGW–464.

9. MCS did not submit any map or showing of pertinent contours to contradict the accuracy of Pacific's showing. However, MCS made a series of tests from a vessel which, it contends, demonstrate that KGW–464 does not provide a useful signal in the San Francisco Bay/San Pablo Bay areas. MCS contends that most of its efforts to contact KGW–464 were unsuccessful. To rebut MCS' allegations, Pacific also made tests which it contends establish that it was able to contact KGW–464 at several different locations. Pacific rated the signal by ear, using a readability scale of CM1–CM5 (CM1 was unreadable and CM5 was perfectly readable). Pacific's report of these tests indicates that at 27 of 46 locations, the signal received varied from readable with only slight repetition (CM3) to perfectly readable (CM5).

10. There is no basis for concluding that one set of the listening tests is more valid than the other. The techniques used by both parties in these tests consisted of little more than attempts to contact KGW–464 from various locations in the San Francisco Bay/San Pablo Bay area.[7] However, as is emphasized by the disagreement between the parties as to reception, their subjective observations, made without the benefit of calibrated field intensity measuring equipment, are of no value in reaching the determination required herein.

11. Under these circumstances, the stipulations agreed to by the parties establishing the methods to be used in determining the service and interference areas of the Class III–B public coast stations involved herein, must be deemed to be controlling in this proceeding. Moreover, we note that this methodology was, in substance, dictated by the Commission's directive in its designation Order, which at para. 14 reads, as follows: "That coverage area, i.e., the reliable service area of a Class III–B public coast station, shall be computed on the basis of the parameters, methods, and other information contained in the Commission's Notice of Proposed Rule Making in Docket No. 18944, adopted August 26, 1970." Since the hearing in this proceeding, the Commission, on May 31, 1972, released its Report and Order in Docket No. 18944, which, among other matters, affirms this theoretical methodology as a basis for calculating the predicted contours of public coast stations, and codifies this method in Part 81 of the Rules governing this service. Accordingly, we believe that this record adequately demonstrates the theoretical existence of destructive interference to KGW–464 from the proposed MCS operation, and that this case must be decided on the basis of the present record. As indicated above, in no event can the listener test be deemed to rebut this theoretical showing, as urged by MCS. In this connection, we further note that the Commission has now also stated its position regarding measurements in this type of service. See the Commission's Report and Order, Docket

[7] During the tests Pacific also listened to a weather station located near the proposed MCS site. Pacific contends that, even though the weather station's signal is weaker than that proposed by MCS in the areas which were tested, the weather station's signal is strong enough to demonstrate that the MCS and KGW–464 operations would result in destructive interference to both operations.

No. 19360, FCC 72–557, released July 5, 1972, para. 5, which reads, as follows:

> We will not adopt the NPMRC recommendation that provision be made for computing coverage areas based on actual observations. While recognizing that this proposal could be more accurate in some situations, we think its disadvantages in complicating and prolonging application processing, which we are endeavoring to streamline and simplify, will substantially outweigh any advantages realized.

12. For all of the foregoing reasons, and particularly on the basis of the facts adduced pursuant to the stipulations, the Board concludes that mutually destructive interference would be caused to KGW–464 by MCS' proposed operation. The extensive overlap of the existing KGW–464 and proposed MCS service contours would result in the destructive interference described by the Commission in its Report and Order amending the Rules in this service (Part 81 of the Rules, FCC 72–557, Docket No. 19360, 35 FCC 2d 642) where the Commission stated that in assigning frequencies to VHF coast stations (such as are involved here) objective is to avoid destructive interference by separating co-channel stations sufficiently to insure that there is no overlap of effective signal propagation coverage (service) areas. The Board's position regarding the assignment of Public Class III–B channels in a situation where interference would result is clearly set out in a recent Decision, *Advanced Electronics*, FCC 72R–210, —— FCC 2d ——, —— RR 2d ——, released August 8, 1972. Generally, it is the Board's position that sufficient channels are available so that it is not necessary or in the public interest to make grants which result in interference.

13. Accordingly, IT IS ORDERED, That the following applications ARE GRANTED:

(a) Western California Telephone Company, File No. 5427–M–P–98, Santa Cruz, California, to the extent that the use of Channel 27 is requested;

(b) Salinas Valley Radio Telephone Company, File No. 770–M–L–40, Pebble Beach, California, Channel 28; and

14. IT IS FURTHER ORDERED, That the application of Western California Telephone Company, File No. 5427–M–P–98, to the extent that it requests the use of Channel 24 IS DISMISSED with prejudice for failure to prosecute; and

15. IT IS FURTHER ORDERED, That the application of Maritime Communications Service, File No. 4900–M–P–48, Almaden, California, Channel 28 IS DENIED; and

16. IT IS FURTHER ORDERED, That the grants made herein are conditioned on the grantees securing an appropriate or required authorization from the California Public Utilities Commission; and

17. IT IS FURTHER ORDERED, That (a) requests for further oral argument and for a waiver of the 5-day time limitation contained in Rule 1.277(c), filed January 24, 1972, by Maritime Communications Service; and (b) the motion to deny request for oral argument, filed February 7, 1972, by the California Public Utilities Commission, ARE DISMISSED as moot; and

18. IT IS FURTHER ORDERED, That (a) the motion to amend all pertinent documents so as to reflect the fact that Arthur W. Brothers is no longer a partner in Maritime Communications Service, filed February 9, 1972, by Maritime Communications Service; (b) the motion to dismiss application of Maritime Communications Service, filed February 7, 1972, by Salinas Valley Radio Telephone Company; and (c) the motion to dismiss application of Maritime Communications Service, filed February 16, 1972, by Western California Telephone Company, ARE DENIED as being without decisional significance in view of our decision herein which requires a denial of the Maritime Communications Service application on other independent grounds.

FEDERAL COMMUNICATIONS COMMISSION,
SYLVIA D. KESSLER,
Member, Review Board.

APPENDIX

RULINGS ON EXCEPTIONS OF MARITIME COMMUNICATIONS SERVICE

Exception No.	*Ruling*
1	*Denied.* Although the Presiding Judge did not explicitly set forth these facts, it is evident that he did consider them. Also, see note 2 and para. 5 of this decision.
2, 3, 4(a)–4(f), 6, 7, 10.	*Denied* as being without decisional significance. In most part, these exceptions are directed to the comparative merits of the various proposals and to MCS' contentions that its proposal is comparatively superior to Western's and Salinas' proposals. As shown by our decision and for the reasons stated therein, we need not, and do not, reach the comparative issue in this proceeding. For we have denied the MCS application, as did the Presiding Judge, because of the destructive interference that proposal would cause to KGW–464, and we have based our decision on this ground, standing alone, without regard to the other issues in this proceeding relating to MCS.
5	*Granted.* As contended by MCS, it is more accurate to describe Western's station as being located near Santa Cruz, rather than as being located *at* Santa Cruz.
8, 9, 15, 16, 18(e), 18(f).	*Denied* as being without decisional significance. In view of our conclusion that the MCS proposal would cause destructive interference to KGW–464, we need not, and do not, reach the issue of whether there is a need for another channel (viz. the MCS proposal) to serve the San Francisco Bay area. As shown by the Presiding Judge's findings, Pacific's Station KMH–828 provides a good grade of service even during the busy hours and busy seasons.
11, 17, 18(d) (last sentence), 23.	*Denied* as being without decisional significance. In view of our conclusion that the MCS proposal would cause destructive interference to KGW–464 requiring a denial of the application on this ground, standing alone, we need not, and do not, reach the issue of whether the boating interest and activity in the southern portion of San Francisco Bay is sufficiently great to make San Jose an appropriate location for another station covering the Bay. Moreover, with respect to MCS' assertion (Exception No. 17) that safety is a factor requiring licensing.

F.C.C. 71D-84

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of	
APPLICATION OF LOREN R. MCQUEEN, D.B.A. AS MARITIME COMMUNICATIONS SERVICE FOR A CONSTRUCTION PERMIT FOR A NEW PUBLIC CLASS III-B COAST STATION TO BE LOCATED AT MT. UMUNHUM NEAR ALMADEN, CALIF.	Docket No. 19006 File No. 4900-M-P-48
APPLICATION OF WESTERN CALIFORNIA TELEPHONE CO. FOR A CONSTRUCTION PERMIT FOR A NEW PUBLIC CLASS III-B COAST STATION TO BE LOCATED NEAR SANTA CRUZ, CALIF.	Docket No. 19008 File No. 5427-M-P-98
APPLICATION OF SALINAS VALLEY RADIO TELEPHONE CO. FOR A CONSTRUCTION PERMIT FOR A NEW PUBLIC CLASS III-B COAST STATION TO BE LOCATED NEAR PEBBLE BEACH, CALIF.	Docket No. 19009 File No. 770-M-L-40

APPEARANCES

Arthur W. Brothers (a partner) on behalf of Maritime Communications Service; *Timothy D. Fitzpatrick*, *A. M. Hart* and *H. Ralph Snyder, Jr., Esqs.*, on behalf of Western California Telephone Company; *Harold Mordkofsky*, *Philips B. Patton* and *Jeremiah Courtney*, *Esqs.* on behalf of Salinas Valley Radio Telephone Company; *Dudley A. Zinke*, *George A. Sears* and *Frank Sieglitz*, *Esqs.* on behalf of The Pacific Telephone and Telegraph Company; *Rufus G. Thayer*, *Esq.* on behalf of the California Public Utilities Commission; and *Terrence P. O'Brien*, *Esq.* on behalf of the Chief, Safety and Special Radio Services Bureau, Federal Communications Commission.

INITIAL DECISION OF HEARING EXAMINER FREDERICK W. DENNISTON

(Issued November 5, 1971; Released November 9, 1971)

Preliminary Statement

1. By Commission Memorandum Opinion and Order (FCC 70-1012), released October 7, 1970 (25 FCC 2d 931), the above-captioned applications were designated for hearing in a consolidated proceeding.[1] The applications are for authority to operate Class III-B Public Coast stations, to provide shipshore radiotelephone common carrier (public correspondence) service on VHF channels, and each will pro-

[1] Also included in the designation was the application of Francis I. Lambert and Harry L. Brock, Jr., d/b/a Advanced Communications Co., File No. 5164-M-P-78, Docket No. 19007, which was dismissed with prejudice by Order released January 25, 1971 (FCC 71M-115).

vide service on 156.8 MHz (Channel 16), the required distress, safety and calling frequency. The applicants seek authority to serve portions of the area between San Francisco/Oakland and Monterey/Pebble Beach in Northern California. The designation order, except for certain specified issues, found the applicants otherwise qualified. The issues in the designation order were subsequently enlarged and modified by the Review Board by Memorandum Opinion and Order (FCC 71R–77) released March 9, 1971. As finally designated the issues are:

a. To determine the facts with respect to the facilities, rates, practices, interconnection with landline facilities and services of each applicant, including the geographic area served and proposed to be served by each.

b. To determine the nature and amount of traffic to be handled by each of the proposed stations, and from what sources such traffic will be derived.

c. To determine what the need is for VHF Public Coast Service to local communities in the area between San Francisco/Oakland and the Monterey peninsula and how that need can best be filled under existing conditions.

d. To determine the area in which station KMH–828 can satisfactorily exchange communications with vessels, and the extent, if any, to which such area would be overlapped by the stations proposed.

e. To determine the area in which station KGW–464 can satisfactorily exchange communications with vessels, and the extent, if any, to which such area would be overlapped by the stations proposed.

f. To determine, in light of the evidence adduced on issues d. and e., whether overlap, if any, would result in an economic climate which would adversely affect the ability of the existing stations to adequately serve the public.

g. To determine the nature and extent of co-channel interference, if any, that would arise from simultaneous operation of station KGW–464 and of the stations listed in paragraph 4 above with an alphabetic designator, and whether such interference would be tolerable or mutually destructive.

h. To determine whether a public coast station to provide service primarily of a local character should be established at Almaden/San Jose, Santa Cruz, Monterey and Pebble Beach, California, even if the general San Francisco Bay and Monterey Bay Harbor areas and coastal waters of the Pacific Ocean in the immediate vicinity lies within an area in which satisfactory marine radiocommunications can ordinarily be exchanged with a public coast station that may have been established or may be established to provide service primarily to another locality;

i. To determine, in light of the evidence adduced on all of the foregoing issues, whether the public interest, convenience and necessity will be served by a grant of any or all of the subject applications.

2. A prehearing conference was held in Washington, D.C., on November 6, 1970, and a field hearing in San Jose, California from February 16 to February 18, 1971. The record was closed by Order released July 2, 1971 (FCC 71M–1110). Proposed findings and conclusions and supporting briefs were filed by the parties on July 23, 1971, and by the Safety and Special Radio Services Bureau of this Commission, and the California Public Utilities Commission, and reply findings were filed on August 4, 1971 by all except the latter two.

FINDINGS OF FACT

Facilities, Rates, Practices, Services and Service Area

Issue 11(a)—Maritime Communications Service (MCS)

3. MCS proposes to establish a Class III–B public coast station at San Jose, California, with a remote transmitter on Mt. Umunhum, near Almaden, California, on the San Francisco Peninsula, operating on the working frequency 162.0 MHz (Channel 28). MCS has facilities on Tomita Hill (Mt. Umunhum) consisting of a 20 x 40 foot building and two 150 foot steel towers upon which the antennas will be placed. Because of the great height of the antennas (3,380' MSL), an extremely large coverage area will result, ranging from 52 to 88 miles. The greatest coverage will be westward over the sea, but will also extend north and eastward over San Pablo and San Francisco Bays. A paved road makes the building and facilities on Tomita Hill accessible in all weather conditions; travel time to repair outages is less than one hour from San Jose. A 10 kw emergency generator plant automatically picks up the electrical power in the event of power failure.

4. The control point for the proposed MCS system will be the Tel-Rad Answering Service in San Jose. The established answering service also performs operating functions for Mobile Radio System of San Jose, a land mobile service. There are at least three operators on duty at all times. MCS will offer dispatch (message forwarding) service as well as interconnected wire line service. At present, there is no dispatch type communications offered in the San Francisco Bay area. It is planned to have a foreign exchange line or radio link to Santa Cruz, to permit toll-free local calls in that area.

5. The control links from Tel-Rad to the antenna on Tomita Hill may be accomplished either by wire line or 72–76 Mc/s radio links, but MCS appears to favor a microwave link.

6. The coverage area of the proposed MCS station, without shadow loss, would extend seaward from a point south of Big Sur in an arc beyond Farallon Island and intersecting the coast at Point Reyes north of San Francisco. Included in this area are San Francisco and San Pablo Bays to the east of the Golden Gate and Monterey Bay along the Pacific Ocean.

7. The service will be interconnected to the telephone system and the dispatch or forwarding service will be offered at no additional cost. MCS will charge 50 cents for the first two minutes and 30 cents for each additional minute. These charges will apply on either dispatch or inter-

109–015—72——4

connected calls. Local calls in the San Jose area will be at no additional charge, and in the Santa Cruz area will also be free when the foreign exchange line is provided. Arrangements have not yet been made for long distance calls, but such charges will be in addition to the radio link charge above.

Western California Telephone Company (Western)

8. Western, an affiliate of General Telephone Company, proposes to establish a Class III–B public coast station at Santa Cruz with the public correspondence frequencies of 161.80 and 161.95 MHz (Channels 24 and 27 respectively). Western's present telephone operating territory covers approximately 400 square miles in the San Francisco Bay area and in part of Northern California. Western had nearly 340 employees on the payroll during the year 1970. Western operates within 5 exchanges providing service to nearly 44,000 telephones. Western operates manual traffic offices and handles the manual toll and local assistance service for most of its customers.

9. Western proposes to provide VHF maritime service (maritime mobile service) through a traffic office within the Los Gatos Exchange where land mobile, toll and local services have been handled since 1966. This office is staffed with 40 employees, and of 16 toll positions, 2 will handle maritime service on a 24 hour, seven days a week, basis.

10. Qualified technical staff is available both within Western and General Telephone to assist in the training and development of traffic operators for maritime service. Calls from land stations to ship stations will be routed by the operator at the switchboards over the control lines to the transmitter by use of voice and/or selective calling arrangements. The operating practices will be consistent with those of the Pacific Telephone and Telegraph Company.

11. Land to ship station calls will be processed by the operator at the switchboard over the control line to the transmitters. Calls from ship stations to land will be processed by the operator from the switchboard to the telephone company dial network. Protection against commercial power failure will be provided by Western with the use of an emergency generator at the antenna site.

12. In addition to personnel maintaining and repairing the proposed facilities Western will, when required, temporarily call in other technically qualified and licensed personnel who are normally on duty at other locations within the operating area of Western and General Telephone Company of California. Facilities will be provided at the control point to meet the requirements of Part 81.116 of the Commission's Rules and Regulations. The various personnel included in operating the proposed facility, such as the service operator, commercial representative and accounting personnel, will be under Western's continuous supervision.

13. The Western station would serve an area of the California coast from Half Moon Bay, on the north, to Point Sur, on the south. The center of this area is Monterey Bay, approximately 75 miles south of San Francisco on the California coast, and which extends from a point west of Santa Cruz on the north to the tip of the Monterey Peninsula on the south, an airline distance of about 23 statute miles.

14. Western's charges for the radio link charge will be $1.00 for the initial 3 minutes and 30 cents for each additional minute, for interstate calls (to or from a ship station beyond 3 miles from shore) pursuant to the charges of Pacific Telephone & Telegraph Co. in AT&T Tariff FCC No. 263; the intrastate charge will be 25 cents per minute or fraction thereof. The above rates will apply toll-free to any point in the Los Gatos (a suburb of San Jose) Exchange area and appropriate charges will be added for calls to or from points beyond.

Salinas Valley Radio Telephone Company (Salinas)

15. Salinas Valley Radio Telephone Company was incorporated in 1956, after operating a radiotelephone utility business for a number of years under the name and style Salinas Valley Radio Dispatch and Courier. Mr. Phillips Wyman acquired a minority interest in the corporation in 1960 and became majority owner in 1964. All of the stock of Salinas is presently held by Mr. Wyman and by members of his immediate family. His wife is active in the business, being office manager of the company.

16. The Salinas control point is located at a telephone answering service which it owns and operates and which presently has switchboard and control facilities to handle more than double the number of lines and the number of radio channels equipped. Salinas now has for its telephone answering and land mobile public utility operations, eleven operators, two with five years or more experience. These employees are capable of expanding their activities to handle the small amount of VHF Marine traffic Salinas expects during the next few years. Salinas has arranged computer-controlled billing operations starting in February 1971, and designed for the inclusion of VHF Marine billings both to local and transient subscribers.

17. Transmitter and receiver equipment necessary for the establishment of the coast station requested already is on hand, as a part of an inventory of equipment resulting from many years of operations in the 150 MHz band, and Salinas related activities as an equipment service facility. It is anticipated that the out-of-pocket expense to establish VHF Marine service will be less than $1,000.00, and that the increased operating expense during the first year or two of operations will be less than $100.00 per month. Salinas is financially qualified to carry loss operations of VHF Marine service, still making a profit on overall public utility operations, for many years to come, if necessary.

18. An associated wholly owned sales and service company dba Tel-A-Car, Inc. is located in the same building as Salinas. This company is an authorized General Electric mobile radio service station for the Tri-County area centered on Monterey Bay and has personnel and equipment necessary for proper radio servicing. It presently rents or leases mobile equipment to land mobile users, and maintain such equipment for them—and for others. It plans to offer rental and maintenance services to Marine mobile users. Only a slight amount of training of technicians as to particular new equipment types will be necessary to provide sales, rental, installation and maintenance service for Marine mobile equipment. Presently Tel-A-Car employs three FCC licensed technicians, one first-class and two second class.

19. Salinas Valley Radio Telephone Company proposes to offer both message forwarding and landline interconnected telephone services to marine mobile units, and proposes to offer either directly or through an associated company, equipment for rent or lease, for short or long term. Twenty-four hour service, year round, will be offered to marine users, just as it is now offered to land mobile users. The calling and safety channel will be monitored on an open speaker monitor at all times, and close liaison with marine safety stations will be maintained. It is proposed that the operators will identify themselves as the "Monterey Bay Marine Operator". Personnel will be properly instructed as to both safety and message operating routines, and will be licensed as required under applicable Federal Communications Commission Rules and License Documents. The control point and message center for the Class III–B Station will be the same as the present land mobile control point and message center. It is located at 323 Rianda Street, Salinas, California.

20. Salinas proposes to install General Electric 50-watt transmitters at its present transmitter location in Pebble Beach. This is a point jutting into the Pacific Ocean and almost entirely surrounded by water.

21. The coverage area of the proposed Salinas station, without shadow loss, will be from Lucie, extending seaward in an arc and reaching a point north of Purisima. The Monterey Bay area will be included in this coverage area.

Nature and Amount of Traffic

Issue 11(b)

22. The principal boating centers along the northern California coast within the area under consideration in this proceeding are:

(a) Half Moon Bay, 18 miles south of Golden Gate;
(b) Santa Cruz, 42 miles south of Half Moon Bay;
(c) Moss Landing, 13 miles south of Santa Cruz; and,
(d) Monterey, 14 miles south of Moss Landing.

23. *Half Moon Bay:* Piller Point Harbor in the Bay does not presently have any boat slips; however, some 18 to 24 commercial fishing vessels and more than 60 pleasure craft, ranging from 18 to 48 feet in length, tie up to private moorings in the harbor. A 20-million-dollar project for this area includes construction of 2,100 slips scheduled to start in September 1971, with completion about the end of 1976.

24. *Santa Cruz:* The largest concentration of pleasure craft is located at the Santa Cruz Marina. At present, there are approximately 400 boats, 90% of which are over 20 feet and up to 60 feet in length. Of these, there are only about 50 small (30 to 40 feet) commercial fishing vessels. Accommodations for an additional 450 boats are now under construction and are expected to be completed within 1½ to 2 years. The Elk Horn Yacht Club is exclusively pleasure craft and presently accommodates 63 boats ranging from 30 feet to 50 feet in length. There are no immediate plans for expansion.

25. *Moss Landing:* The Moss Landing South Harbor is principally a commercial fishing boat facility with 80% of the 300 boats falling

in this category. The remaining 20% are medium to large pleasure craft. The boats in this harbor generally range in length from 30 to 60 feet with some up to 90 feet. Expansion plans include the construction of 75 to 100 additional slips by the end of 1971 to accommodate craft up to 30 feet in length. Further expansion in two to four years will include facilities to accommodate 100 to 125 vessels 40 to 50 feet in length.

26. *Monterey:* The Monterey Marina has a capacity of, and if filled with 370 boats, of which about 30 are less than 20 feet in length. In addition, many boats anchor in the harbor. Approximately 50% of the boats moored at this marina are commercial fishing vessels, the remainder being pleasure craft, many of which are used for both pleasure and commercial fishing. Plans include the construction of a new breakwater at Monterey during 1971 and the construction of 1,300 additional slips.

27. In addition to the boats located in the above-mentioned location, there is fairly steady coastal traffic of tankers and freighters that ply the waters in the area concerned. It is estimated that there are on an average 10 such trips per day.

28. The amount of traffic to be anticipated is highly speculative. The practical phase-out of the present Medium Frequency (MF) band assigned to Marine service for small craft, commences January 1, 1972, when new installations will be banned, and will be complete in 1977.[2] It is accordingly necessary to estimate for the near future, not only the number of craft expected to be radio-equipped and how fast boating will grow, but the number of existing MF-equipped boats that may be expected to convert to VHF beginning in 1972.

29. It is understandable that the estimates of traffic vary widely. Western assumes that 50% of the boats will have VHF and will generate seven calls per year, or a total of 3,500 calls per year. Maritime Communications, with a large coverage area, estimates there are 10,826 potential radio users in its area who may make from 6 to 36 calls per year even at the lower rate, 64,956 calls annually would be anticipated. Growth in radio-equipped vessels is estimated at 200 per year. Salinas Valley, however, projects a rate of 4,800 minutes of use per year by the end of 18 months, and would increase by 50% at the end of 6 more months and again double by the end of 3 years, to an estimated total of 1,200 minutes per month or 144,000 call minutes per year; reduced to calls of an average of 3 minutes, this would represent 48,000 calls. Western, which seeks authorization for two channels "conservatively" foresees at least 3,500 calls per year. All of the evidence points to an explosive expansion in the need for VHF service in the immediate future. Pacific, which operates two stations in the general area, expresses no objection to Salinas Valley and Western's proposals. Moreover, its station KMH–828 shows an increase in calls from 1965 to 1970 of 160%, and it anticipates a further increase of 60% by 1972. It is accordingly concluded that adequate traffic may be anticipated to justify the recommended grants herein.

[2] While MF will continue after that date under certain circumstances, those doing so must be equipped with VHF.

Need for VHF Service to Local Communities between San Francisco and Monterey Peninsula

Issue 11(c)

30. The coast from San Francisco south to Morro Bay is rugged and lacking in natural harbors or sheltered waters. A breakwater recently constructed at Half Moon Bay provides the first all-weather shelter south of the Golden Gate. Moss Landing and Monterey, both on Monterey Bay, are the only other all-weather shelters north of Morro Bay. Santa Cruz has a large yacht harbor but its accessibility is limited by shallow water at the entrance. The coast line is irregular, having many points projecting into the sea with deep coves in between. In some areas the shoreline is convex and in others it is concave. Most of it is rocky except the east side of Monterey Bay. South of Carmel the shoreline becomes precipitous rising to heights of from 500 feet to over 4,000 feet abruptly from the water's edge.

31. The principal boating centers along the California coast between San Francisco and Morro Bay on the south, as heretofore noted, are: Half Moon Bay, Santa Cruz, Moss Landing, Monterey, and Morro Bay, which is 95 miles south of Monterey. The "local communities" are thus these boating centers and the areas reasonably adjacent thereto wherein the boat owners presumably live and have their places of business. Service between those points and vessels utilizing public correspondence service interconnected with the telephone system, should, when possible, be at no additional charge for the landline portion, i.e., be a local call, or with minimal toll charges where beyond.

32. Judged by the foregoing, Pacific's KGW–464 provides no local service. Its transmitter is located at Vacaville, inland midway between Oakland and Sacramento, its claimed coverage, with shadow loss, does not reach any of the coastal boating centers, and without shadow loss, would reach only the waters off of Half Moon Bay. If communication between a vessel off-shore of Half Moon Bay and that community were possible through KGW–464, it would be at the expense of substantial toll charges, the exact amount of which are not of record. It is thus concluded that KGW–464 does not render service "primarily of a local character" as contemplated by Section 81.3(j) of the Rules, so far as these communities are concerned. Moreover, while Pacific's KMH–828, with antenna at Oakland and rate center at San Francisco, might be considered as providing local community service with respect to Half Moon Bay, it does not do so with respect to the remainder.

33. It is accordingly found that a definite need exists for VHF service local to the major portion of the communities enumerated, which is not now being met.

Coverage of Pacific Station KMH–828 and Overlap

Issue 11(d)

34. KMH–828 operates on Channel 16 (safety and calling channel) and public correspondence Channel 26 (161.9 MHz), with essentially the same service coverage. The transmitter antenna for Channel 26 and the transmitter-receiver antenna for Channel 16 are located 5

miles northeast of Oakland at an elevation of 1750 ft. Where other systems in the Domestic Public Land Mobile Radio Service are operated by Pacific. The Channel 26 receiver is approximately 2 miles north at 1823 ft. elevation.

35. Station KMH–828 has a coverage area that extends from Sebastopal along the coast to Point Reyes then sharply out to sea extending beyond Farallon Islands and reaching the coast at Franklin Point north of Point Ano Nueva.

36. The station proposed by MCS will cover at least 60% of the area now being served by Pacific's KMH–828, including all of the San Francisco-San Pablo Bay areas. The only ocean coverage area of KMH–828 that will not be overlapped by the MCS proposed station is a triangular area that extends out to sea beyond Farallon Islands and the close-in coast coverage between Sebastopal and Point Reyes.

37. The station proposed by Western Telephone will cover that portion of Pacific's area along the coast between Half Moon Bay and Franklin Point.

38. The station proposed by Salinas will cover the lower half of the area that Western will overlap Pacific and immediately adjacent thereto and, toward the ocean, a small additional area presently served by Pacific.

Coverage of Pacific's Station KGW–464 and Overlap

Issue 11(e)

39. Pacific's station KGW–464 (Channel 28), primary coverage area is inland serving the rivers and bays. However, ocean coverage does exist from Point Reyes south, passing inside the Farallon Islands and reaching the coast at Franklin Point.

40. The station proposed by MCS will overlap almost the entire ocean coverage area of station KGW–464 and it will also overlap inland portions in the San Francisco-San Pablo Bay areas.

41. The station proposed by Western Telephone will overlap a small area, now covered by KGW–464, between Franklin Point and Pigeon Point and extending several miles to the seaward.

42. The station proposed by Salinas Valley will overlap little if any of the coverage area of Pacific's station KGW–464.

Effect of Overlap on Existing Stations

Issue 11(f)

43. The overlap on existing stations KMH–828 and KGW–464 by stations proposed by Salinas Valley and Western Telephone as shown under findings made above is very slight. The record does not disclose any adverse economic effect on the existing station by these two proposals. Moreover, Pacific interposes no objections to the granting of those proposals.

44. The MCS proposal will cover major portions of the existing stations as shown under findings made above. The number of calls handled

by Pacific Telephone's station KMH–828 during each of the past 6 years beginning in 1965 are as follows: 1965, 4,371 calls; 1966, 5,142 calls; 1967, 4,986 calls; 1968, 6,752 calls; 1969, 7,983 calls and 1970, 11,406 calls. Giving consideration to the foregoing trend in call volumes, to changes in the Commission's Rules and Regulations relating to shipboard installation of VHF and medium frequency radio and to FCC requirements with respect to the use of VHF maritime mobile service, which become effective with respect to new shipboard installations on January 1, 1972, it is estimated that station KMH–828 will handle approximately 13,500 calls in 1971 and approximately 18,700 calls in 1972. The foregoing actual and estimated call volumes represent all calls through the station whether such calls are completed or not complete.

45. Although annual traffic volumes are significant, the traffic offered during the busy hours of the busy season is the accepted industry basis for determining channel requirements for the handling of traffic in a manner satisfactory to the user. The busy season for station KMH–828 consists of the months of June, July and August. During the busy season of 1970, the one public correspondence channel of KMH–828, which was occupied an average of less than 50 per cent of the time during the busy hours, was able to provide a "good grade" of service to the boating public according to Pacific. It is estimated that this one public correspondence channel will still be able to provide a good grade of service even with the increase in traffic volume estimated for the 1971 busy season. It is estimated that the average busy hour channel occupancy will be about 52 per cent during the busy season of 1971 and Pacific estimates an additional channel will be required in the immediate future.

46. Most of the calls to KMH–828 involve ships within the San Francisco Bay and adjacent inland waters. A study conducted by Pacific Telephone shows that there is little interest in maritime mobile service to and from ships located in those parts of San Francisco Bay which lie closer to MCS's proposed control point than to the KMH–828 rate point in San Francisco.

47. It is accordingly concluded that the rapidly expanding need for this service is such that the granting of other applications will not affect the ability of the existing stations to adequately serve the public.

Co-channel Interference

Issue 11(g)

48. The only frequency common to the parties to this proceeding is 162.0 MHz (Channel 28). MCS and Salinas Valley have both applied for this channel and KGW–464 already operates on this frequency.

49. MCS' proposed station would cause destructive electrical interference to the station proposed by Salinas Valley and the Salinas Valley proposed station would cause destructive electrical interference to the station proposed by MCS.

50. As heretofore noted, the MCS proposal would substantially overlap Station KGW–464 and, being on the same channel, would

presumably cause destructive electrical interference throughout that entire area of overlap. MCS, however, offered evidence indicating that tests were made from a vessel at various points in the Bay area at some of which it was not possible to communicate with KGW–464; it concluded that no useful communications capability exists between vessels in San Francisco Bay or on the coastal areas and KGW–464, except north of the Richmond Bridge in the San Pablo Bay area. In rebuttal, Pacific offered testimony of two of its Staff Engineers and a dealer in electronic equipment specializing in VHF marine radios, who participated in tests to determine the validity of the MCS contentions. These tests were made with calibrated and pretested equipment. The tests partially confirmed the MCS tests except that at some points at which MCS reported no communication possible, the Pacific tests indicated communications of less than commercial quality; in other instances, the signals were of good commercial quality. In any event, it is conclusively established that mutually destructive electrical interference would exist between the MCS station and KGW–464 in the major portions of San Pablo and at least the northern portion of San Francisco Bay.

Local Service for Almaden/San Jose, Santa Cruz, Monterey and Pebble Beach

Issue 11 (h)

51. The thrust of issue (h) is to see if an area should have local service even though the area is already served by a station, albeit that station is located at a distant point and providing service primarily to another locale. From the findings made under issue (c) above, it is clear that the areas in question are not served by any existing VHF facility.

COMPARATIVE ASPECTS (ISSUE (i)) AND DISCUSSION

52. The need for VHF service in the light of the changes in Commission regulations is so well established on this record as to require no further discussion. The essential issue is as to how the service may best be provided in the public interest.

53. The MCS application represents a threshhold issue in that it would serve the entire area proposed by both Western and Salinas Valley. Essentially this would be the most efficient use of the frequency sought. But by reason of the great range incident to the exceptionally high antenna location, its outreach brings it into intolerable electrical interference with an existing station KGW–464. The question is not whether MCS might place a better signal in certain areas but whether its signal creates interference with ones already there.

54. In its Reply to Proposed Findings, MCS urges that if it is deemed necessary to deny it Channel 28 due to co-channel interference, that it be granted Channel 27, the channel sought by Western. There is no basis for such an action in this record and it is accordingly concluded that the application of MCS must be denied.

55. Western seeks two channels without having offered sufficient justification therefor. It is clear that the grant of Channel 27 is appropriate but adequate justification for Channel 24 has not been offered. In any event, a grant of Channel 24 would violate the priorities established in Section 81.304(b)(22) of the Rules, and accordingly will be denied.

56. There is no opposition to the grant of Channel 28 to Salinas Valley, and no indication of destructive co-channel interference with KGW–464. The application should be granted.

57. The grants proposed herein, Channel 27 to Western and 28 to Salinas Valley, together with existing KMH–828 on Channel 26, will be compatible with the grants recently recommended in the Southern California area (FCC 71D–45) and provide the same channels for vessels which may utilize both areas.

58. The California Public Utilities Commission participated actively in the hearings and offered helpful evidence. Its proposed findings dealt primarily with the jurisdictional question of whether marine radio calls to and from vessels outside the three mile limit are intrastate or interstate in character. While the question is one of concern both to that Commission and to this Commission as well, it cannot be resolved in this proceeding.

CONCLUSIONS

59. In view of the foregoing, it is concluded that the public interest, convenience and necessity will be served by the granting of the applications of Salinas Valley as to Channel 28 and Western as to Channel 27, and by the denial of the application of MCS and of Western with respect to Channel 24.

IT IS ORDERED, That unless an appeal from this Initial Decision is taken by a party or the Commission reviews the Initial Decision on its own motion, in accordance with the provisions of Section 1.276 of the Rules, the application of Salinas Valley Radio Telephone Company, File No. 770–M–L–40, Docket No. 19009, IS GRANTED; the application of Western California Telephone Company, File No. 5427–M–P–98, Docket No. 19008, IS GRANTED as to Channel 27, 161.950 MHz, and DENIED in all other respects; and the application of Loren R. McQueen,[3] d/b as Maritime Communications Service (MCS), File No. 4900–M–P–48, Docket No. 19006, IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION,
FREDERICK W. DENNISTON,
Hearing Examiner.

[3] The testimony indicated that MCS now consists of a partnership with 90% interest in McQueen and 5% each in A. W. Brothers and R. E. Matteson.

F.C.C. 72-955

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Applications of:	
NATIONAL BROADCASTING CO., INC. For Renewal of License of WNBC-TV, New York, N.Y.	BRCT-1
COLUMBIA BROADCASTING SYSTEM, INC. For Renewal of License of WCBS-TV, New York, N.Y.	BRCT-3
AMERICAN BROADCASTING CO., INC. For Renewal of License of WABC-TV, New York, N.Y.	BRCT-221

MEMORANDUM OPINION AND ORDER

(Adopted October 26, 1972; Released October 31, 1972)

BY THE COMMISSION: COMMISSIONER JOHNSON DISSENTING.

1. The Commission has before it for consideration identical petitions directed to each of the above applications entitled "Petition to Deny Application for Broadcast License, Deny Renewal of Broadcast License and Revoke Broadcast License," filed May 1, 1972, by Anthony R. Martin-Trigona. Pleadings in opposition and reply thereto have also been filed.

2. The petitions herein are identical in nature and consist almost entirely (15 of 19 pages) of two other pleadings filed previously by Martin-Trigona. That is, Martin-Trigona incorporates petitions to deny which he filed in 1969 against the above-captioned network owned New York television stations. These petitions concerned alleged concentration of media, conflict of interest, and anti-trust violations by the networks. In September of 1969, the Commission dismissed the petitions on the grounds that Martin-Trigona lacked standing and that a number of the matters raised therein were the subject of rule-making proceedings. *National Broadcasting Co., et al.*, 20 FCC 2d 58, *aff'd sub nom. Martin-Trigona* v. *FCC*, 432 F 2d 682 (D.C. Cir. 1970).

3. The second pleading incorporated by Petitioner in the instant proceeding is identical (except for the caption) to the ones originally directed against the 1972 renewal application of eight New England television stations.[1] In the petition, Martin-Trigona requests that the networks' licenses be "revoked" because of their fail-

[1] WTEV-TV, WPRI-TV, and WJAR-TV, Providence, Rhode Island; WBZ-TV and WNAC-TV, Boston, Massachusetts, WTIC-TV and WHNB-TV, Hartford and West Hartford, Connecticut, respectively; and WTNH-TV, New Haven, Connecticut.

ure "to place reasonable and proper time limitations on political broadcast commercials to eliminate false and misleading 'spot' political advertising campaigns and to other wise [sic] move toward removing all one minute or less political spot advertising from the airwaves . . ." The petitions previously raising this issue were dismissed several months ago because Martin-Trigona lacked standing and because the allegations posed broad policy questions which were more appropriately the subject of rule-making proceedings—having little relevance to individual station renewals. *WGAL Television, Inc., et al.*, 34 FCC 2d 296.

4. Also incorporated by reference into this proceeding is the civil anti-trust complaint filed under Section 4 of the Sherman Act [2] by the Department of Justice in the U.S. District Court for the Central District of California.[3] According to Martin-Trigona, the Commission has "primary jurisdiction," and "must now adjudicate the claims of the petitioner and all other citizens of the United States."

5. Section 309(d)(1) of the Communications Act provides that "[a]ny party in interest may file . . . a petition to deny any application." It was firmly established in *Office of Communications of United Church of Christ* v. *FCC*, 359 F. 2d 994 (D.C. Cir. 1966) that any responsible representative of the listening or viewing public in the area in which the station was located could attain standing to challenge the station's license renewal. More recently, although dealing with the standing of a public interest organization, the Supreme Court in *Sierra Club* v. *Morton*, —— U.S. ——, 40 U.S.L.W. 4397 (April 19, 1972), cited with approval *United Church of Christ*, *supra*, as standing for the proposition that the party seeking standing must have suffered a direct injury and must either reside in the geographic locale, or, as in the case of an anti-trust violation, must have suffered competitive economic injury. *Id.* at 4407.

6. Petitioner is a resident of Illinois, far removed from the coverage area of any of the licensees. He has failed to recite any specific factual allegations showing how he has been injured by these New York television stations in such a manner as to give him standing to intervene. As the Court stated in *Martin-Trigona*, *supra*, petitioner's pleadings make it clear that although "he is unhappy about the networks, . . . it is far from clear that his objections are peculiar to the three flagship stations in New York City . . . ." We conclude, therefore, that petitioner does not have standing in this proceeding.

7. Finally, as noted above, the Commission has issued two previous opinions relating to Martin-Trigona's petitions and those rulings are equally applicable herein. As far as the civil anti-trust suit is concerned, petitioner overlooks the fact that the Commission is not charged with the responsibility of enforcing anti-trust or other laws relating to unfair trade practices, although we do take cogni-

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[2] 26 Stat. 209, 15 U.S.C. 4.
[3] Civil Action No. 72-821—LTL, filed April 14, 1972.

zance of these practices in determining the public interest, *Waterman Broadcasting Corp. of Texas*, 28 FCC 2d 348 (1971). Subsequent to adjudication of the suit, the Commission will follow its long-standing policy of evaluating each case on an *ad hoc* basis.[4]

8. Accordingly, IT IS ORDERED, That the petitions to deny the above-captioned applications for renewal of license filed by Anthony Martin-Trigona ARE HEREBY DISMISSED.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

[4] Report on Uniform Policy as to Violations by Applicants of Laws of United States, 1 R.R. part 3, 91:495.

F.C.C. 72–957

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of CONSIDERATION OF THE OPERATION OF, AND POSSIBLE CHANGES IN, THE "PRIME TIME ACCESS RULE", SECTION 73.658(k) OF THE COMMISSION'S RULES PETITIONS OF: NATIONAL BROADCASTING CO., INC. (NBC) MIDLAND TELEVISION CORP. (KMTC, SPRINGFIELD, MO.) KINGSTIP COMMUNICATIONS, INC. (KHFI–TV, AUSTIN, TEX.) (FOR DELETION OF THE RULE) MCA, INC. (TO PERMIT USE OF "OFF-NETWORK" MATERIAL PLUS 25 PERCENT NEW MATERIAL)	Docket No. 19622 RM–1967, RM–1935, RM–1940, RM–1929

NOTICE OF INQUIRY AND NOTICE OF PROPOSED RULE MAKING

(Adopted October 26, 1972; Released October 30, 1972)

BY THE COMMISSION: COMMISSIONERS ROBERT E. LEE AND H. REX LEE CONCURRING AND ISSUING STATEMENTS; COMMISSIONERS JOHNSON AND HOOKS CONCURRING IN PART AND DISSENTING IN PART AND ISSUING STATEMENTS.

I. INTRODUCTION AND DISCUSSION

A. Introduction

1. In this proceeding, the Commission seeks information as to the effect and operation of Section 73.658(k) of its Rules—the "prime time access rule"—and invites comments on changes in that regulation which may be appropriate for the future. The categories of information sought, and possible changes, are discussed at some length below. One matter should be clarified at the outset: while "possible changes" include repeal of the rule, the institution of this proceeding does *not* represent a Commission view at this time that the rule should be repealed, now or later. See par. 15, below.

2. Section 73.658(k) was adopted in the Report and Order in Docket 12782, May 1970 (23 FCC 2d 382, 18 R.R. 2d 1825). It was affirmed generally on reconsideration in August 1970 (25 FCC 2d 318, 19 R.R. 2d 1869). In general, it provides that after October 1, 1971, network-affiliated stations in the "top 50 markets" may present, during the four hours of "prime time" each evening, no more than three hours of material from the three national networks, ABC, CBS, and NBC. Effective October 1, 1972, subparagraph (k)(3) of the rule provides that the time thus cleared of network programs (i.e., one hour a night, gen-

erally the hour from 7 to 8 p.m. E.T. and P.T., 6 p.m. C. T. and M. T.) may not be filled with "off-network" material (programs which have appeared on one of the three networks) or feature films which have been shown by a station in the market within the past two years. Thus, in effect, one hour of prime time each night must be devoted to material which is neither network programming nor in one of these other categories.[1] The basic purpose of the adoption of the rule was set forth as follows (23 FCC 2d 395–396, par. 23, 18 R.R. 2d 1844):

> We believe this modest action will provide a healthy impetus to the development of independent program sources, with concomitant benefits in an increased supply of programs for independent (and, indeed affiliated) stations. The entire development of UHF should be benefitted . . . It may also be hoped that diversity of program ideas may be encouraged by removing the three-network funnel for this half hour of programming. In light of the unequal competitive situation now obtaining, we do not believe this action can fairly be considered "anti-competitive" where the market is being opened through a limitation upon supply by three dominant companies . . .:

3. Among the matters to be considered herein are the various petitions listed above.[2] We shall describe briefly the petitions and oppositions thereto, and then set forth the Commission's purposes in this proceeding, dealing with the prime time access rule and the "access period."[3]

4. *Another pending petition to limit use of TV "re-runs" generally.* This proceeding does not directly involve the subject-matter of another recently filed petition, that by Mr. Bernard Balmuth and a group called S.T.O.P. (Save Television Original Programming), asking for a general rule limiting use of prime-time repeat material on network-owned or network-affiliated stations to 25% of the broadcast year (RM–1977). This petition, which has drawn substantial support and opposition, will be considered by the Commission in the near future.

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[1] At the same time as the "prime time access rule", the Commission also adopted other restrictions on the three networks, contained in Section 73.658(j) and sometimes called the "syndication" and "financial interest" rules. These sharply restrict the extent to which these organizations may engage in the non-network distribution of TV programs, or "syndication", or acquire interests in TV programs other than the right to network exhibition. These rules are not directly involved in the present proceeding. The "prime time access rule" applies by its terms only to the top 50 markets. However, the networks decided that, as a matter of business judgment, they could not continue to present more than three hours of prime-time programs for the rest of the country if barred from access to their affiliated stations in the top 50 markets for more than that amount of prime time. Therefore, network prime-time schedules have been cut back to 3 hours a night across the board, generally a half-hour less than had previously been programmed by them.

[2] Three of the petitions seek, in effect, repeal of the rule—those of NBC and the two individual stations listed, both UHF stations in comparatively small "intermixed" markets. These three petitions have been supported by some individual station licensees (not all of them identified); the NBC petition has been opposed by Westinghouse Broadcasting Company, Inc. (Westinghouse, a large station owner and supplier of non-network program material, and long one of the chief proponents of the rule) and by American Broadcasting Companies, Inc. (ABC) insofar as NBC seeks rule-making looking toward early repeal of the rule. Hughes Sports Network also opposed the two UHF petitions.

[3] The term "access period" is used herein to refer to the portion of prime time which is generally cleared of network programs in the top 50 markets, as the rule operates. For the 1971–72 season, this has included all nights from 7 to 7:30 p.m. E.T. and P.T. (6–6:30 p.m. C.T.); 7:30–8 p.m. E.T. (6:30–7 p.m. C.T.) except for all networks' affiliates on Tuesday nights and CBS and NBC affiliates on Sunday nights: and 10:30–11 p.m. E.T. (9:30–10 p.m. C.T.) for CBS and NBC affiliates on Tuesday. ABC affiliates on Wednesdays, NBC stations on Fridays, and CBS affiliates on Sundays. There are a number of exceptions to this general pattern.

For 1972–73, the "access period" will be more uniform as far as nights of the week are concerned, being 7–8 p.m. E.T. and P.T. (6–7 p.m. C.T.) on all nights for ABC stations and all but Sundays on CBS and NBC; and, on Sundays, 7–7:30 p.m. and 10:30–11 p.m. for CBS and NBC affiliates.

It is not to be considered in the present proceeding, as such, but the two are clearly related to a degree; for example, the feasibility of developing and producing a given non-network series could vary depending on whether the supplier must furnish 39 individual programs (75% of 52 weeks) or may get by with as few as 26 (50%) or perhaps even less. We merely call attention here to the pendency of this petition, and to the fact that it may be appropriate to give this subject consideration in rulemaking. Parties may wish to prepare their comments herein with this in mind.

B. The Petitions for Rule Making

5. As mentioned, three of the above-captioned petitions for rulemaking—those of NBC and two UHF stations in comparatively small "intermixed" markets—seek repeal of the rule, the two individual petitions both apparently asking it for this coming year, 1972–73, and NBC envisioning it in time for the 1973–74 season. NBC asks the Commission to initiate forthwith a Notice of Proposed Rule Making broad enough to include rescission of the rule, to develop on an expedited basis the facts as to how the rule is operating, and to convene a conference among members of the staff and all interested parties, to devise methods to obtain this material promptly and completely. NBC's argument relates largely to the asserted decline in the television audience in the 7:30–8 p.m. (E.T.) period, compared to what it has been when network programs were presented then, assertedly 7% in the top 50 markets and 6% elsewhere, compared to no change or some increase for the remainder of prime time (and also an increase for Tuesdays, when the networks have begun their programming at 7:30 following the waiver to ABC).[4] While NBC recognizes that part of the audience change has been a shift to independent stations from network affiliates, it asserts that, as the above figures show:

> . . . the preference for network programming is so strong that millions of viewers would rather not watch television at all than watch nonnetwork programming.

Therefore, it is claimed, as shown by the other two petitions, stations are adversely affected, particularly those in small markets which always have had narrower margins. NBC also claims that the rule has not been and will not yield benefits in terms of an expanded production of quality first-run material, or of increased diversity of programming. It is claimed that there are very few new producers, and that many, and the most successful, "first-run" programs are those which are continuations or revivals of network prime-time or daytime material (*Hee Haw*, *Lawrence Welk*, *Wild Kingdom*, *Let's Make a Deal*, *To Tell the Truth*, *Truth or Consequences*, *What's My Line* and *Juvenile Jury* are cited as examples). A study by an advertising agency of November 1971 non-network programming (7:30–8 p.m. E.T.) is cited, giving for the top 10 programs in audience two off-network

[4] Other sources discussing this subject, including Westinghouse Broadcasting Co. in opposing the petition, claim lesser audience-loss figures, such as 4% or 2% over-all for the 7:30–8 p.m. period. It appears unquestionable that, in markets where there are independent stations as well as network affiliates, there has been a shift in viewing during this period away from the affiliates to the independents.

series, five continuations of network series, two revivals, and only one entirely new series (Primus), with only one of them reaching an audience as large as the tenth-rated 7:30–8 p.m. network program of the previous year, *High Chaparral.*

6. Westinghouse Broadcasting Company, Inc. (Westinghouse), which is both a large multiple TV and radio owner and an extensive supplier of syndicated material, vigorously opposes the NBC petition, as premature and unsupported. It is urged that as far as gathering information is concerned, a new proceeding is unnecessary; Docket 12782, which was not closed out, can be re-opened for this purpose; and that adoption of the proposal will have a most discouraging effect on the development of non-network material, and in fact will "make a mockery" of the full and fair test which the rule is supposed to have this coming year, adding to the uncertainty which already unfortunately prevails and which has a depressing effect on the program-production activity. Westinghouse asserts that despite NBC's criticism of the course of non-network program development, it lists 32 *new* first-run series, of which several are properly regarded as truly innovative (cited are Westinghouse's *Doctor in the House*, *David Frost Revue* and *Norman Corwin Presents*, *Primus* from Metromedia, and *Story Theatre* and *Rollin' on the River* from Winters-Rosen). Westinghouse claims that this is a good record, particularly in view of the adverse circumstances which prevailed (the uncertainty as to the rule itself until it was affirmed on appeal in May 1971, which gave producers little time before the fall season, and the exemption to permit use of "off-network" material) and the industry's traditional preference for proven and successful program ideas. ABC's arguments in opposition to a rule-making (though not to the gathering of information) are much the same as those of Westinghouse; it is said that development of a viable first-run syndicated programming market may well require innovation, and that "innovation typically follows from experimentation; and experimentation requires time." In short, it will be serveral years before a really sound judgment can be reached as to the success of the rule, or lack of it; and that meanwhile the Commission can best maximize the chances for success by going on record to the effect that the Rule will be given a reasonable opportunity—not "one year of full effectiveness under the 'gun' of a repeal proceeding." [5]

7. In reply, NBC added somewhat to some of its earlier arguments. It stated that 1972–73 is as good a "test" year as any, and that the pendency of a rule-making proceeding can have no adverse effect on the results of such a test, since the programming which is available will already have been planned and largely produced, before the fall season begins.

8. The petitions by the two UHF stations mentioned, essentially similar to each other, emphasize the "economic injury" argument urged

[5] ABC asserts that the lower audience mentioned by NBC may reflect largely the presentation of "off-network" material during the access period—naturally, people prefer present network programming to former network programming.

Hughes Sports Network, opposing the two UHF petitions although not that of NBC, briefly urged some of the same arguments as Westinghouse and ABC, including the assertedly "premature" nature of any proceeding at this time.

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by NBC, particularly with respect to their own situations as UHF stations in intermixed markets, at a competitive disadvantage vis-a-vis the VHF stations in the same markets (two in Springfield, Mo., one in Austin, Texas). They claim that they are able to survive as long as they have the exclusive right to present a full line-up of one of the three networks in their areas; but with the "access rule" cutback, they are seriously injured, through loss of the network revenues which they formerly received for the time involved and through having to pay the costs of programming the time themselves. It is said that, with the lower audience which is obtainable for the non-network material (particularly with the greater problems in tuning UHF to begin with), the small revenues they obtain from selling the time on a non-network basis do not begin to compensate for these increased costs. The point is also made that, with non-network material being extremely costly, they cannot compete for desirable "access time" programs with their VHF competitors. Hughes Sports Network opposed these filings.

9. *The MCA, Inc. petition.* The petition of MCA, Inc. (RM–1929) looked toward the adoption of rules (in time for the 1972–73 season) under which material would comply with the "off-network" restrictions of the rule if it consisted of "off-network" material plus about 25% new material (4 programs out of 13, 7 out of 26, etc.). MCA urged this as a measure to permit more production of new non-network material of quality, by eliminating some of the tremendous costs and risks involved in an entire new series. It was claimed that this would mean more good-quality material, at lower cost and thus more easily available to stations, particularly those in small markets and UHF stations in intermixed markets, which often have limited resources. MCA has long been a vigorous opponent of the rule, and expressed here its doubts as to its merits; but it stated that this is one small step which the Commission can, and should, take quickly to ease part of the problem. The Commission denied this petition in April 1972 (*Petition of MCA, Inc.*, 34 FCC 2d 825, 24 R.R. 2d 1771).[6] The chief basis of decision was that the petition—*which sought a change in time for the 1972–73* year—was premature.

C. *The reasons for this proceeding and the Commission's views on it.*

10. There is clearly a need for a proceeding dealing with the prime time access rule. First, there is the need to gather information about how the rule is working, both as compared to no rule and as compared to how it would work with various changes discussed herein. As to the propriety of gathering such information at this time, there appears little room for argument, and, indeed, no party really contests this. This Commission has some degree of obligation to conduct a continuing examination into the effect of any of its rules; and this is particularly true where, as here, the rule represents a breakthrough into a new area of regulation, previously not subject to rules or restrictions. It is

[6] In its present rule-making petition, NBC mentions the MCA petition and asserts that, if the Commission is going to give consideration to this type of change in the rule, it might well give consideration also to letting new network material back into the cleared time, rather than older "off-network" programming.

especially true here because of the degree of controversy which surrounded the rule both before and since its adoption. Also, we expressed in our decision in Docket 12782 the belief that the rule should and would be examined from time to time, to see what changes, if any, should be made in it. Therefore some gathering of information is clearly in order. This could be done in Docket 12782; but that proceeding is over 10 years old and a great volume of material has been accumulated in it. We believe it preferable, from the standpoint of reaching prompt decisions herein, to call for the submission of the new, current material in a new proceeding. However, Docket 12782 has not been closed out, and the material therein is rather readily available; we will accept comments referring to it just as if the material were re-submitted herein.

11. Also, as far as the information-gathering may be "premature", we recognize that information for the 1972–73 year, which is what basically will be involved here, may not be as favorable to the rule as that for some later period, when more of the necessary adjustments and developments involved have occurred. However, we believe that, if allowance is made for further developments, as commenting parties are urged to outline in as much detail as is now possible, a fairly accurate idea of the rule's prospects can be obtained at this point. We will make such allowances in reaching any decision herein.

12. There is a second clear basis for this proceeding: the apparent need for certain changes in the rule if it is to operate in the public interest to the maximum extent. These include some of a more or less mechanical nature, to ease the burden on affected parties and the Commission, and others of a more substantial nature. The need for changes, as outlined herein, does not need much elaboration. The rule in its application and administration has given rise to a very large number of waiver requests, which have been a burden to the parties involved and to us. It is, obviously, highly desirable to eliminate the need for many of these, by adopting general rules which more nearly fit the range of situations which are involved. The sports area is one example of situations where a general rule would appear feasible and much preferable to present practice. Probably of more basic significance are areas such as the "off-network" situations, where it is questionable whether the rule if literally applied would serve the public interest, and where, at the same time, any deviation from it on an *ad hoc* basis appears to give problems. Moreover, apart from the specific problems in various areas which have arisen, there is a more general consideration. No "new rule", such as this one, can be expected to be 100% sound and correct when it is first adopted. After a year's experience under it, it is appropriate to see how it is working and make those changes which appear appropriate.

13. Thus, in view of the above considerations, an over-all proceeding is warranted at this time. We have decided to include in that proceeding the question of whether the rule should be retained or rescinded. Three of the petitions before us, listed above, have raised this question, and in our view these can best be disposed of in the context of this proceeding, and particularly in light of the information gleaned through

it. In any overview such as this, we should have flexibility to take any and all actions which the record may show to be in the public interest. Moreover, we see no adverse consequence from proceeding in this fashion. The programming for the 1972–73 season will not be affected because, as NBC points out, it is already "set", or virtually so. As to the effect on the future, particularly the 1973–74 season, the short answer is that we plan to gather the data and dispose of the basic issues raised by the petitions on a prompt basis—in early 1973, and before there can be too much of an untoward effect on the 1973–74 season.

14. Indeed, from the point of view of the proponents of the rule, this approach should be advantageous, because—if the review is favorable to the rule—it will remove any cloud over it, not only for the next year but quite likely for several years to come. To put it otherwise, there must be an overview, in light of the nature of the rule and need for at least some changes in it, and, that being so, it is better to effect the overview at this point and "get this matter behind us." As to the timing of this examination, the "off-network" and "feature film" provisions of Section 73.658(k)(3) will now be in effect, and we should be able to get a good indication of the rule's prospects. As stated, we will make due allowance for the fact that the rule is still fairly new, so that perhaps it has not yet reached its full potential. Parties are urged to comment, in as much specific detail as possible, on what significance should be attached to the fact that the rule is still rather new, and any related uncertainties.

15. We make one final point—although it should be unnecessary. The Commission has *not* adopted any decision or view, even of a tentative nature, as to the desirability of rescinding the rule. It would be wholly wrong for us to do so, when the 1972–73 year is just getting under way and there is no data before us as to the efficacy of the rule under full conditions, i.e., with Section 73.658(k)(3) in effect. Indeed, we stress that the presumption is the other way: the Commission has a rule which is now going into full effect, and there is thus a clear and considerable burden upon the opponents to demonstrate that, in actual operation, the rule will not serve the public interest, particularly in light of the purposes set forth in paragraph 2, above. This proceeding gives interested parties an opportunity to make showings on this critical issue, and thus facilitate an informed Commission decision. In light of the petitions and other circumstances, nothing less would be appropriate, but nothing more is to be inferred from what is simply a sound and fair way to proceed to the disposition of significant pending petitions.

II. SPECIFIC INFORMATION REQUESTED AND SUBJECTS INVOLVED

A. Information Sought

16. As mentioned, one of the most important purposes of this proceeding is to gather information about the operation of the prime time access rule, both in relation to the changes proposed herein (including rescission of the rule), and generally for the Commission's guidance as to the future. What is sought is information as to *effect*

and impact—from the operation of the rule as compared to operation without it, and from the various modifications considered herein (and past waiver actions) as compared to operation under the rule as now in effect. The effect on future development is also highly important. The specific points covered below are all subsidiary to that general objective. The information sought falls into two general areas: *programming* information and *economic* information, the latter involving three aspects—the impact on stations, the economics of program production and distribution, and the effect on the program production business. In both areas, the Commission expects to rely partly on data other than that submitted in comments, as discussed below; but unquestionably commenting parties can be of considerable assistance if their information is specific and complete.

17. *Programming data.* With respect to programming, the Commission intends to rely partly on data contained in *TV Guide* for the various parts of the country, and also American Research Bureau (ARB) audience survey material, which lists the programs presented by stations covered (e.g., May 1972). However, this data is not always completely informative as to the nature of the program; we hope that as many TV station licensees as possible will present information in this area (including the networks, both as networks and as station licensees). As mentioned, the primary objective is to obtain information as to the *effect and impact* of the rule or possible changes in it (or waivers of it).[7] The specific information sought is as follows:

(a) The programs that the station has been presenting in the "access periods" during 1971–72, will present in 1972–73, and will present further in the future as far as it can be projected: (1) under the rule basically as it now stands; (2) if there were no "prime time access rule";[8] (3) with various changes in the rule, including adoption of a "21 hours a week" standard, possible relaxation to permit some use of "off-network" material as part of regular program series or for individual programs or short series, and others mentioned herein. We hope licensees will submit enough information to give an idea of the nature of the program as well as its title, in particular (except for network programs and the better-known syndicated programs) whether it is locally originated or syndicated, and the program type. The three networks are expected to indicate, as best they can at this point, what programs they would be presenting as network material in 1972–73 and later years, during the "access periods", if this time were available to them.

(b) What has been and would be the effect, in terms of the presentation of and demand for new syndicated or local programming (and on the incentive to produce such material) of one or more of the following:

[7] While this investigation relates largely to "top 50 markets" network-affiliated stations, other stations are invited to comment, since the rule in practice has had an effect "across the board."

[8] If there is no other information indicating what would be the station's practice in the absence of the rule, it may show its programming for the 1970–71 season, the last before the rule became effective.

(1) grant of waiver to stations in the top 50 markets to carry network news at the beginning of prime time without having it count toward the permissible three hours, if preceded by a full hour of local news.

(2) grant of waiver to the networks to present one-time news and public affairs programs without counting in the permissible three hours; on a more general exemption for programming of these types.[9]

(3) Change to a "21 hours a week" standard instead of three hours a night, either completely or partly, such as allowing a small amount of occasional deviation to "make up" network programs lost through preemption, or to clear a one-hour segment between news and network programs, or permitting flexibility within the 21-hour framework provided at least a half-hour of non-network material is presented each night.

(4) permitting generally (or refusing to permit) sports "runover" waivers, for example games in the late afternoon running, somewhat past 7 p.m. E.T.; or permitting presentation without limit of a small number of important events such as the Olympic games.[10]

(5) Changes in Section 73.658(k)(3), including: (1) relaxing the "off-network" restrictions with respect to individual "special" programs or short series, or generally permitting as much as 25% of a series to be old material, or a considerably higher percentage such as urged by MCA, Inc. in RM–1929; and changes in the "feature film" provisions as mentioned in paragraph 41, below.[11]

(6) Providing that, as far as the Mountain and Pacific time zones are concerned, a program schedule will meet the rule if it complies with the three hour restriction in the Eastern and Central time zones.

(c) What non-network programming (syndicated or local), intended for carriage during the "access periods", will be available to stations during the 1972–73 season? We hope that program producers and syndicators, and station licensees as to local material, will give full and reasonably specific information in this respect.

(d) To the extent the basic concept of the rule—limitation to three hours of prime-time network programming, and thus promotion of independent program sources—is not working in optimum fashion to further the public interest, how would the situation be either improved or worsened by substantial liberalization of the "off-network" restrictions, for example, as urged by MCA, Inc., in RM–1929?

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[9] This question is regarded as particularly important because the availability of such material is an essential ingredient of broadcasting in the public interest, and at the same time diversity of viewpoints is also highly significant. Commenting parties are asked to indicate how much such material is available from non-network sources, or is likely to be in the future, and how this would be affected by our action here.

[10] We are particularly interested in what effect an occasional "runover", to the extent of 10 minutes or so, actually has on what the station presents in the following hour—whether it presents the same non-network programs it would have otherwise but simply "clips" them, or whether it substitutes other material, and if so what.

[11] See paragraph 48 below, concerning four recent decisions in the "off-network" area as to which parties may wish to comment.

18. *Possible criteria for evaluating program "diversity" and similar matters.* One of the primary purposes of the rule was to promote *diversity* of program sources and ideas (see paragraph 2, above). We therefore seek information on this subject, particularly how the rule works in practice in this respect. In addition to its general meaning—the extent to which material is different from other material presented in the market currently or in the recent past—this concept could have a number of different particular aspects:

(a) programming which is of a different *type* from most other programming fare, for example, the factual-fictional distinction made in the *Wild Kingdom* and *Lassie* decisions;

(b) the number of times, if any, that the exact same program has been presented in the market, at least in recent years, for example only once earlier on the network as opposed to two or more times;

(c) the length of time since its last presentation, for example, the "two years" test for feature films; and

(d) the extent to which the material, while never itself shown before, is simply a continuation of a series which has already run in the market (on a network or non-network basis) to the extent of hundreds of generally similar episodes. There are doubtless other specific aspects.

19. Another related but much more difficult matter is being advanced—that of "program quality". For instance, MCA Inc. in its petition asserts that the non-network material being presented in the access period is "of shoddy and inferior quality." [12] The Commission has traditionally, and wisely, eschewed the role of being a judge of the "quality" of programming. We therefore have great difficulty in evaluating this aspect of the present matter. Interested parties are of course free to submit—and if they treat this subject at all, we hope that they will submit—showings making *objective* points in this regard. We ourselves have not formulated any objective standards for making "quality" judgments, and do not now perceive the basis for doing so. Thus, factors such as ratings, comparative production costs, and critical favor (or lack of it), while obviously relevant to the issue, have never been regarded as reliably and objectively determinative of the issue of "quality" or what is "superior" or "inferior" program material. As indicated, parties advancing arguments along these lines are urged to do so on some kind of *objective* basis.

20. *Economic data: effect on stations.*[13] As indicated above, one of the chief lines of argument against the rule is the asserted adverse economic effects on stations, perhaps particularly small-market stations and UHF stations (e.g., the two petitioners mentioned here, in intermixed markets). Initially, we stress that "economic injury" considerations are pertinent only where they have consequences signifi-

[12] Obviously, what is generally involved here is *comparative* quality, non-network "access period" material vis-a-vis the network material which would be shown then in the absence of the rule. This raises the question of what network programming should be used as a basis of comparison (for example, a good deal of it does not last as long as one season).

[13] The stations referred to here are not only, or even primarily, the stations in the top 50 markets which are literally covered by the rule. With the cutback in network schedules across the board, stations in other markets are affected also.

cantly impairing licensees' ability to operate in the public interest. The Act does not guarantee any level of profitability.

21. There are certain problems inherent in attempting to get this type of information in public comments. First, to be of probative value, either economic data concerning impact on stations must include data for *all* stations—the "universe"—or it must include data from a representative and scientifically valid sample of that universe. There is no assurance that comments in themselves will provide either of these. Second, there is sometimes, and might be here, an understandable reluctance on the part of the licensees to "bleed in public", even if substantially impacted economically. Therefore, it is necessary to take steps to assure that the material in this area on which decision is reached is complete and valid, even if it means going beyond what is publicly filed. Also, of course, it is desirable to set forth certain guidelines with respect to material which is filed publicly, to make sure that it is complete and probative.[14]

22. The following provisions indicate what is expected of parties filing herein concerning the economic impact of the rule on their stations, and what may be required in addition to the comment material:

(a) Comments by licensees claiming adverse economic impact on their stations, if they wish to have their claims given serious consideration, must make a complete showing therein as to the "access periods", i.e., those periods when they presented non-network programs but would have presented network material if the networks had continued their 1970–71 prime time pattern: This shall include exact data as to revenues from network programming and non-network programs, and the costs of the latter (including outright costs, and transportation or other charges, if any), for the 9-month period from October 1, 1971 through June 30, 1972. If effect on the value of "adjacencies" is claimed, this must be accompanied by data as to how much was so received in 1970–71, and how much was in fact received, for the same 9-month period.

(b) Parties filing comments raising "economic injury" arguments need not necessarily show in their comments the complete picture as to the station's revenues, expenses, and profit or loss;

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[14] An example of the type of problem which may arise in this connection is the petition by the Springfield, Mo. UHF licensee (RM–1935). This party set forth figures as to what it has lost in network compensation through the cutback ($112.50 weekly); and the costs for the non-network programming it has to buy instead ($172.50 in expenditures, plus $55 freight charge, plus $300 in commercial positions given for "barter" programs). On this basis, it estimated that the rule was costing it $640 a week, or over $33,000 a year. However, it did not state what revenue it receives from the sale of its non-network time during the access period, simply asserting that it has had a 26% audience loss for the 6:30–7 p.m. (C.T.) period, and that its revenues from the sale of this time on a non-network basis did not amount to recovery of the increased costs. Obviously, the material in the petition does not give a complete picture. This material was supplemented by petitioner and counsel after a Commission staff inquiry.

In general, commercial time given in "barter" programs is not properly includable as a cost item in this analysis, since it is reflected in the reduced revenue received for a non-network program when only part of the commercial time in it is available to the station to sell. However, stations may make a showing in this respect if they wish, since, if a susbtantial amount of the commercial time in a program must often be given to the program supplier, it represents an inherent limitation on the return which the station can expect from the program.

but they must be prepared to file immediately after their comments, if it is requested, an FCC Form 324 giving this data for the 9-month period mentioned above. This will be handled subject to the usual provisions as to confidentiality governing Forms 324.

(c) At some point, it may be necessary to inquire of all commercial television licensees, or at least all of those which are network affiliates in markets having at least three stations, as to data concerning the financial effect of the rule on them. This inquiry, which would require clearance by the Office of Management and Budget, is not being instituted at this time, but may later be instituted this year if it appears necessary on the basis of the comments filed.

23. *Economic data: the economics of program production and distribution.* One of the most common lines of argument against the rule is that, with networking being a very efficient mechanism and much the cheapest way of distributing programming and supplying advertising support for it, any alternative method of program supply entails more money for distribution and less for production, and, therefore, lower quality, particularly because of the very high and increasing costs of such production. Related is the argument that, with these high costs and with the risks involved in the non-acceptance of programs by the public and station customers, the networks are among the very few parties who can afford the risks involved in production of good-quality material. These arguments were, of course, considered at length in the Docket 12782 proceeding which led to adoption and affirmance of the rule. We have no intention of instituting a new or long and exhaustive re-exploration of the subject. On the other hand, we would certainly welcome and take into account new data in this area, if offered within the time frame of this proceeding as indicated below.

24. We seek data on subjects like the following:

(a) What actually is the cost of producing "good-quality" programming, both network and non-network (syndicated or local) either per episode or total? (Figures in the previous record in Docket 12782 have contained a rather wide variety of figures).

(b) To what extent is program quality related to production costs, and, specifically, how (higher salaries for better people, more processing and therefore more technicians, etc.).

(c) What are the comparative costs of distribution of network programming and non-network syndicated material, and, with the latter, of securing advertising support for it?

(d) To what extent is it realistic to assume that there is a fixed sum of money available for the whole program-supply process, so that if more goes into distribution, less is available for production?

(e) To what extent do the higher costs and risks involved in non-network production and distribution (if they are higher) mean that prime time programming is going to be of a type cheaper to produce, such as so-called "game shows", rather than the material which has previously characterized prime time?

25. *Economic data: effect on the program production industry and employment therein.* As indicated in paragraph 2, above, a main purpose of the rule was to provide a healthy production industry, able to supply independent programming. One of the arguments against the rule is the assertedly depressing effect on the U.S. program-production

industry. While the factual basis of such arguments is not always completely clear, it appears to consist chiefly of two actual or potential lines of development: (1) the substantial extent to which, to keep costs down, "access period" non-network material consists of material originating, or at least produced, outside the U.S.; and (2) the extent to which access-period non-network material is of a sort sometimes called "game shows"—relatively inexpensive material similar to (often a continuation of) programs which have appeared on daytime television—rather than the sort of material which is characteristic of network prime time television. Comments on this subject are invited.

B. *Specific proposals on which comments are invited.*

26. In the following paragraphs, comments are invited on specific proposals; under each topic, the proposals are set forth first, followed by a brief discussion of the pertinent considerations. Usually, they are on a "one or more" basis, i.e., one, or more than one, of the suggestions might be adopted if it appears in the public interest.

27. Initially, one point should be stressed. Putting forth a proposal for comment herein does not mean that the Commission necessarily has a view, even tentatively, that it should be adopted. It simply indicates our view that the proposal should be considered in light of the comments and data received in the proceeding. Further, on some of the matters, study may indicate the need for further, perhaps more specific, proposals; this is one reason why this is a "Notice of Inquiry". However, we have given notice herein of the "subjects and matters at issue", and therefore all interested parties are specifically advised that the Commission has the flexibility and discretion to adopt rule changes in the following areas if it finds that the public interest would be served thereby (with the exceptions footnoted below).[15]

28. *Effective dates of changes.* If rule changes are adopted, there is then the question of when they should be made effective, for example: (1) the usual 30 days or so after publication in the Federal Register, or (2) for the next season, starting October 1, 1973, or perhaps even thereafter. As to some minor changes, the first approach might well be appropriate; it appears obvious that major changes, or rescission, could not well be adopted before the next season (these would probably include matters such as a flat "21 hours a week" standard and modification of the "off-network" restrictions to or approaching the extent urged by MCA, Inc.). Comments on the appropriate dates of changes are invited.

29. *Changes in the direction of a total or partial "21 hours a week" standard.* Comments are invited on the question of adopting one or more of the first three following proposals, or, in the alternative, adopting the fourth proposal listed, going to a flat "21 hours a week" standard.

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[15] The foregoing discussion applies to the proposals set forth in this subsection B, which are, for the most part, in the direction of relaxations of the rule. As to other matters set forth below in subsection C, extensions of the rule in various respects or "exemptions" for certain types of programs other than news and public affairs, this is an Inquiry proceeding only. See also par. 49 in this subsection B.

(a) Leaving the basic three-hour-per night formulation, but providing that stations may exceed that amount on one or two nights a month to the extent of a half-hour or an hour, provided they reduce network prime-time material a corresponding amount within the next 14 days.

(b) Leaving the basic three-hour restriction, but providing that stations may deviate from it (following notification to the Commission) where they regularly present some news at the beginning of prime time and desire to clear a following one-hour segment regularly for an hour-long local or syndicated program, and the only way they can do this and continue to carry desired network material is to exceed the 3-hour limit on another night.[16] (see *Hubbard Broadcasting, Inc.* (KSTP–TV), 32 FCC 594 (October 1971). The "21 hours a week" standard would apply in these cases.

(c) Providing that stations may adhere to a "21 hours a week" standard, but must continue to present at least a half-hour during prime time each night of material which is not network, off-network nor recently shown feature film.

(d) A flat "21 hours a week" standard. If this is to be adopted at all, it will not be before October 1, 1973.

30. The "21 hours a week" argument was one raised by several stations in waiver requests in 1971, in support of requests for waiver to exceed the permissible three hours on one night a week, accompanied by a reduction on another night. In general, this was rejected, although it was one of the considerations in grant of waiver in the *Hubbard Broadcasting* case cited. We similarly rejected the concept, for the future, in denying ABC's request for continuation of its waiver for Tuesday nights (*American Broadcasting Companies, Inc.*, 33 FCC 2d 1038, March 1972). The reasons have been a belief that time should be available to non-network program sources on a *regular* basis, the same period each night or at least not varying from week to week, in order to encourage the development of such material, for example programming suitable for "stripping" in early prime time. Also, there was some thought that stations might simply fulfill their obligations under such a relaxed restriction on one "junk night", presenting all of their non-network material then and programming the remaining evenings with 3½ hours or more of network material.

31. Nevertheless, there appear to be some considerations supporting this type of relaxation. First, it would increase licensee flexibility; as noted in the *Hubbard* decision, this appears to be the only way stations can clear time for a one-hour non-network program if they carry news after the beginning of prime time, and continue to carry desired network material. Also, it could be that adherence to a strict three-hour standard tends to discourage occasional preemptions of network programs for desirable local material, if the station is faced with the complete loss of the network program and perhaps even carriage of it by a competing station in the market (whereas, under a "21 hours a week" standard, the station could "make up" the program preempted on another evening).[17] These are the thoughts behind the first two proposals above. Another consideration is that it might not be a bad thing

[16] This is probably more of a problem in the Central and Mountain zones, where prime time begins at 6 p.m. rather than 7, than elsewhere. According to ARB February–March 1972 audience survey data, about two-thirds of the "top 50 market" stations in those zones carry news in the early part of prime time, compared to only about one-third in the rest of the U.S.

[17] This has come up largely in connection with local sports events, such as basketball, in which cases the station is probably going to go for the preemption, whether it can "make up" the network program later or must forego it entirely. However, there could be desirable local material for which the choice would not be so clear.

for some of the cleared "access periods" to be later in the evening, since somewhat different types of programming might thus be presented and encouraged (see paragraph 57, below). Parties supporting relaxation along one or more of the lines indicated should give specific examples of situations where the present restriction is undesirable, if there are any; parties opposing such relaxation should indicate specifically why it is important to have time available on a *regular* basis.[18] Another pertinent question in this connection is whether, whatever may be decided as to individual stations, the networks themselves should be permitted any deviation from a three-hour standard.

32. *Other changes in computation of prime time network programming.* Comments are invited on the adoption of one or both of two other changes in the method of determining the amount of permissible prime-time programming. The first change set forth below is designed to resolve automatically the situation prevailing in a few markets not observing daylight-saving time (presently Detroit, Grand Rapids, Indianapolis and Phoenix) during the portion of the year (late April to late October) when it is observed in the U.S. generally. This change is believed self-explanatory. The two changes are as follows:

(a) Providing that, automatically as a matter of rule, in the case of "top 50" markets which do not observe daylight-saving time, during the "daylight-saving time" part of the year (late April to late October) prime time will be moved back one hour, e.g., to 6–10 p.m. E.T. instead of 7–11 E.T., for these stations, corresponding to the local time at which network material is actually received in these places.

(b) Providing that, with respect to prime time network programming (or possibly other evening material also) any arrangement which complies with the rule in the Eastern and Central time zones will also be acceptable for stations in the Mountain time zone, and possibly also the Pacific time zone.

33. The second change above is based on a suggestion by NBC in the recent proceeding (Docket 19475) in which we changed the "prime time" programming for the Mountain time zone to 6–10 p.m. M.T. NBC's suggestion was that stations in the top 50 markets in the Mountain zone be permitted to carry more than three hours of prime-time network material if the schedule of such programs in the Eastern, Central and Pacific zone meets the standards of the rule, so that the excess occurs only in the Mountain zone. This was adopted only in part in the Report and Order in Docket 19475 (24 R.R. 2d 1972, FCC 72–578, 37 F.R. 13622), with respect to situations where the network material that evening is live and simultaneous, such as a sports event, and where the station in the Mountain zone broadcasts no other network material during prime time (including "pre-game shows") the same evening. The Phoenix NBC affiliate, supported by NBC, has recently sought reconsideration of our refusal to adopt the entire NBC proposal.

34. While the change in "prime hours" to 6–10 p.m. M.T. will eliminate many of the problems which have arisen this past year (such as sports or movie "runovers" which occur after 11 p.m. E.T.), and

[18] One problem with adopting a flat "21 hours a week" standard is that there are a number of stations which regularly present less network prime-time material than that, most often where they peempt a network movie, or other network material on one evening, to present their own local movie. If these stations were permitted to apply this non-carriage to the whole week, it could result in their keeping very little time open for new non-network material. Comments on this type of situation are invited.

others will be taken care of by the NBC proposal as adopted, it may be that further extension along these lines will be appropriate. Comments are invited on whether the Note to Section 73.658(k) adopted recently should be extended to include complete sports events where there has been a "pre-game show", or "runovers" of events which are not live, simultaneous material, such as movies. Comments are also invited on whether this principle should also extend to additional programming presented by networks on the same evening in the East before the particular event but which Mountain zone stations wish to present after the event.[19] Comments are also invited on whether the same principle should be extended to the top 50 markets in the Pacific zone, not so much in connection with "runovers" (which are not a problem since the sports event occurs quite early) but for network programming presented before the game in the East but which these stations may wish to present after the game in the West (or material programmed especially for the West).[20] The Commission does not have any views at this time as to whether changes along these lines should be adopted: we have recognized before the problems which stations in these time zones face in integrating "simultaneous" material into the usual pattern of delayed broadcasting which prevails there. One important consideration, here and elsewhere, is *to what extent relaxation along these lines actually will impinge on the availability of prime time on these stations to non-network sources.* Comments on this point are solicited. These are examples of changes that will be made at an early date if it appears that the public interest will be served thereby.

35. *Rules designed to deal with sports event situations.* One of the most common subject of waiver requests, and Commission consideration of them, has been in connection with sports events. The following rules are proposed to deal with these situations for the future; the first three below are alternatives, and the fourth, involving a somewhat different concept, is a separate matter which may be adopted with or without one of the others.

(a) With respect to "runovers" into prime time of late-afternoon events (and possibly also some events scheduled for prime time) putting the burden of accommodating the "runover" on the networks and stations in the carriage of network programming, by providing that if a late-afternoon event runs over into prime time (i.e., after 7 p.m. E.T., or 6 p.m. C.T.), network evening programs must simply start that much later, so as to leave a full hour for non-network material at the beginning of prime time (e.g., if the event runs until 7:10, the network's evening material could not start until 8:10).[21]

(b) Providing by rule that it is assumed that sports events will last no more than a certain time, and ignoring runovers beyond that time. (Comments are invited on what are appropriate time allotments for various types of events; it presently appears that 3 hours for

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[19] See *KOOL–TV* (Phoenix, Arizona), FCC 72–735 (August 16, 1972).

[20] See *Academy Award and Miss America programs*, 33 FCC 2d 743, 23 R.R. 2d 987 (February 1972); and the waiver granted NBC affiliates on August 29, 1972 (FCC 72–782).

[21] This type of scheduling, while unusual, is certainly not unknown, for example following Presidential messages early in prime time. It may be that this is the simplest way of dealing with the matter, particularly if the incidence of sports event "overruns" is as small as the networks say it is.

baseball and football, and 2¼ hours for basketball, should be sufficient, at least in the absence of a "pre-game show" or post-game material.) Comments are also invited on the matter of pre-game shows and post-game shows generally; to what should any assumed fixed period for sports telecasts permit these? We are presently of the view that it should be only in connection with games of unusual importance—playoffs or championship games—and not regular season contests, and not for more than 15 minutes (see our action of August 29, 1972, FCC 72–782, 25 R.R. 2d 228, granting waiver to NBC affiliates).

(c) Providing that if an event runs more than a few minutes over the allotted period—say more than 5 minutes, or more than 10 minutes—the network or its affiliate will have to "give back" a half-hour of time on some evening during the following few days.

(d) Designating by rule a certain number of unusually important sports events, which, along with related material, may be presented without observing the Section 73.658(k) limitations. These might include the summer and winter Olympics, the World Series, New Year's Day and other year-end bowl games, the Super Bowl, and possibly a few others; but we are certainly of the view that it should not extend beyond a small number of events.

36. Considering that sports events involving possible prime-time problems occur on only a limited number of days of the year—probably no more than 50 for each network—it appears that this subject may have aroused more concern, and required more action, than it is worth. It appears eminently desirable to adopt a definite rule, or at least an over-all policy, in this area. Comments are particularly desired on what actually is the impact from a relatively small and occasional "runover" on the availability of prime time to non-network sources. In other words, what do stations do if the event runs until 7:10 p.m. E.T.? Do they simply carry the same material they would have carried if the event had ended at 7, "clipping" it slightly, or do they substitute other, shorter material, and, if so, what? One thing which should be borne in mind, also, is that while the networks often put their requests in terms of being able to carry the event to completion, this is not usually true. Rather, it is a question of whether, if they do, they may still carry their full complement of evening material.[22]

37. *Relaxation of the "off-network" restrictions of the Rule.* Comment is invited on the following changes in the "off-network" restrictions of the rule, contained in Section 73.658(k)(3). One or more of the first four changes in the "off-network" restrictions set forth below may be adopted, with or without the fifth, which is really a somewhat different concept. The possible changes are as follows:

(a) Providing that the "off-network" restrictions do not apply to material which was not part of a regular network program series, i.e., an individual "special" program or a small series of material, say no more than six programs;[23] or providing that while the rule imposes a general restriction on all

[22] The discussion here, except for the fourth proposal mentioned above, relates largely to the late-afternoon situations. Sports events actually scheduled for prime time do not raise any great number of problems, and it appears that these may be handled by adjustments in time-computation along the lines mentioned in pars. 32–34, above.

[23] The rule as adopted in May 1970 actually read in terms of excluding only material which was "off-network syndicated series programs." The change to restrict off-network material generally was made in the August 1970 decision on reconsideration.

material, stations in the top 50 markets may present up to ____ hours per year of off-network material coming in the above categories (comments are invited on what this figure should be).

(b) Providing that a "package" of material may be presented including some, but no more than 25%, or some smaller percentage, of off-network material (e.g., special Christmas programs in the "Lassie" or other series).

(c) Providing that stations may present without restriction (or up to ____ hours a year) of "off-network" material, provided the material itself was not shown on a network within a certain number of years (e.g., 5) and the series of which the particular material is a part has not been on the network for a less number of years (e.g., 2).

(d) Continuing the 1972 arrangement of considering waivers of this restriction, on an *ad hoc* basis, but providing for more orderly treatment, including public notice of such waiver requests, and more or less simultaneous consideration of all such requests well in advance of the year for which waiver is sought (e.g., requests would have to be in by March 1, 1973 for the 1973–74 season, and decision would be reached by May 1). Comments are invited on whether, if such an approach is to be adopted, a certain total number of hours of off-network material should be permitted, and if so, what that figure should be.[24]

(e) Adoption of a rule looking toward the type of relaxation urged by MCA, Inc. in RM–1929, permitting any off-network material to be presented as part of a package of which at least 25% is new material. We also raise the question of whether, assuming such a relaxation is to be made, a higher percentage of new material, e.g. 50%, should be required.

38. The "off-network" restriction is potentially one of the most troublesome areas of the rule. It represents, not the objective of the rule to lessen network control of television programming (which is taken care of by the basic "three-hour" limitation plus the "syndication" and "financial interest" rules) but, rather, that of protecting the newly "cleared" portion of prime time for access by non-network sources of program material. As such, it obviously serves a needed purpose; but, at the same time, it is also a significant restriction, including in its present form a bar on the presentation of some highly worthwhile material, sometimes—as with "one-time" material, and probably short program series—material which if presented during prime time would not have a very substantial impact on the availability of time to non-network sources. The latter was one of our chief reasons for the grant of waiver to the six-program *Six Wives of Henry VIII* series (Time-Life Films 35 FCC 2d 773). For this reason, we raise the issue of whether relaxation should be considered along the lines of the first two approaches set forth above, or, alternatively, approaches (c) or (d), which would probably mean more relaxation. As elsewhere herein, parties opposing relaxation are urged to discuss the *impact and effect* of any such relaxation, by rule or waiver, on the availability of prime time to non-network sources of new material, with specific examples of actual or potential preclusion.

39. Item (e), above, inviting comments essentially on the *MCA* request or a modification of it, represents a somewhat different concept: whether, in view of the very high cost of and asserted risk involved in producing new material, it might not be desirable to permit a "mix" of new and off-network programs in a package, and, if so, what percentage of new material should be required. Parties supporting such

[24] Parties may wish to comment on this subject in light of the four decisions referred to in paragraph 48 below, concerning "off-network" material, and on the matter of objective standards which might be appropriate in this connection (see paragraph 40).

a change should discuss in detail the impact it would have on station purchase and presentation of truly *new* material.

40. In connection with this subject generally, and particularly the approach set forth as item (d), above, comments should discuss to what extent the judgments involved here can appropriately reflect program quality determinations, and, if they can or must, what objective standards can be formulated in this connection so as to avoid subjective judgments. With respect to items (a) and (b), above, comments are invited on whether this type of exemption should be granted only in the news and public affairs area, and what is the availability of this highly important type of material from non-network sources.

41. "*Feature film*". Section 73.658(k)(3) also contains restrictions on the use of movies during the cleared portion of prime time; as the rule reads, there is an ambiguity as to whether a film previously shown as a *network program* is thereafter "an off-network" program, permanently barred from these hours, or is a "feature film" which can be used in them after two years from its previous showing. It appears that other changes may also be appropriate. Comments are invited on one or more of the following changes:

(a) Clarification of whether a movie previously shown on a network is an "off-network program" or a "feature film" for purposes of Section 73.658(k)(3), and which of these two alternative constructions would most serve the public interest.[25]

(b) Whether, in this respect, there should be any difference between movies *originally made primarily for theatre exhibition*, and those *primarily made for television* (e.g., treating the former as "feature films" but the latter as "off-network" programs); and if there is to be a difference, what test should be applied if there is any question (e.g., where the film first appeared).

(c) Whether it is really in the public interest and consistent with the basic objectives of the rule to permit during "cleared" time the use of feature films shown in the market as recently as two years ago, or whether instead this period of prohibition should be longer, such as five years, or perhaps permanently with respect to a previous showing on the station itself.

(d) Whether, on the other hand, in view of the economic structure of the film-buying business, the "two year" period should be shortened, say to one year, at least as to feature films bought by the station up to mid-October 1972 (this is essentially what is urged in a pending request by a Salt Lake City station).

42. Aside from the obvious desirability of removing the ambiguity mentioned, this subject presents some more basic considerations. As far as the presentation of an individual film is concerned, it probably makes little difference to the viewer if it appeared previously in the market as a network program or a locally shown film, or whether it was created for theatre showing or especially for television. From this standpoint a fairly liberal approach might not be inappropriate.

43. But there is also another consideration. The use of "feature films" during early evening hours by network stations in the top 50 markets has not up to now been great, averaging only about one hour per week per market of prime time according to ARB audience survey data for February–March 1972. However, there are some indications that this may increase, particularly if the Commission adopts a rather liberal

[25] If network-shown movies are to be treated liberally, comments are invited on a matter which has been raised: how can "feature film" be defined so as to prevent a high percentage of network entertainment programs being classified as "feature film" so as to get this more liberal treatment?

view, so that stations in these markets will devote a considerably larger amount of time to such material. This would, of course, have an impact on the availability of prime time to other kinds of non-network material (local or syndicated). While the rule was not designed to promote any particular type or form of programming, it was certainly intended to promote *new* non-network material; and presentation of movies already shown looks in the other direction. Comments on this point are invited.

44. The same general considerations might also indicate a lengthening of the "two-year" period for any film, and particularly where the previous showing was on the station itself—a situation in which, normally, there should be no problem in determining whether or not a given movie was or was not run in the past, even years ago. This was the reason for limiting the period to two years on reconsideration in August 1970. Comments are invited on whether it would be appropriate to bar permanently from the cleared hours feature films previously run on the same station, as well as on the desirability of lengthening the period generally. On the other hand, the point has been urged recently that the usual basis on which films are bought—such as "five years and five runs" at a very high price—almost automatically requires that more than one of the runs be in prime time, if the station is to be able to recover its investment. It is urged that therefore a lesser restriction should be adopted, as to the station's re-use of its own material. Comments are invited.

45. *Exemption for regular network news following an hour of local news, and for one-time (or other) network news and public affairs programs.* Comments are invited on adoption of one or more of the following, as a matter of rule or at least of fixed policy:

(a) Continuing for the future (and putting into the rule) the policy adopted for 1971–72, and recently for 1972–73, concerning a waiver for network news at the beginning of prime time where it follows a full hour of local news (e.g. from 6–7 E.T.). Under this policy, such network news does not count against the permissible three hours.

(b) Continuing, for 1973–74 and later years, the waiver or exemption granted for one-time network news and public affairs programs ("documentaries").

(c) Affording an exemption, for 1973–74 and later, for network news and public affairs programs generally.

46. As to the first matter mentioned, we have favored this policy. As we have noted, the broadcast of in-depth coverage of local news and problems, in major cities, is to be encouraged as definitely in the public interest; and, as a practical matter, stations can avoid the impact of the rule anyhow by splitting their news, so as to present a half-hour of local first, then network (e.g., at 6:30 p.m. E.T.), and then local against at the beginning of prime time. There appears no reason to require this "bracketing" form of scheduling as a matter of rule, although 19 stations in the top 50 markets do it (25 operate under the waiver). On the other hand, this does represent a substantial impingement into the availability of prime time to non-network sources; and comments should be invited at this time on whether this policy should be made permanent.

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47. The second matter is perhaps more difficult. The rule contains an exemption for "special news programs dealing with fast-breaking news events, on-the-spot coverage of news events", etc., but not for news or public affairs "documentaries", although when the rule was adopted there was some thought that the exemption should be broader to include them. (See concurring statement of Commissioner H. Rex Lee in FCC 70–466, 23 FCC 2d 428). There is, obviously, a high degree of importance to the presentation of such material in quantity, for the better information of the audience, and, at the same time, *diversity* of viewpoints and sources is probably more important here than it is with entertainment programming which is the main thrust of the rule. There is also a practical consideration: a number of programs presented by the networks during 1971–72 year have involved partly "on the spot coverage of fast-breaking events", etc., but partly background material of a documentary nature; and without the waiver, network staffs, and the Commission, might be faced with a fairly knotty problem of what *is* "on the spot coverage", what are "fast-breaking events", etc.[26] Existence of the waiver does serve in this respect to make life simpler. Comments on whether this exemption should be made permanent are invited, including, particularly, *the matter of to what extent such material is available from non-network sources.* Item (c) above requires little elaboration. As noted, the matter of a general exemption for this type of network material was considered at the time the rule was adopted, and has been raised again; in this general overview parties are free to comment on it.

48. *Comment on waiver actions.* Parties are invited to discuss certain waiver actions of the past year, including, particularly, the four involving "off-network" material (*Wild Kingdom*, *Lassie*, *National Geographic*, and *Six Wives of Henry VIII*), the *ABC Summer Olympics* decision, and the decision granting CBS waiver for one-time network news and public affairs material, or documentaries. We do not expect, nor require, that comment will be made separately on these matters; but rather that parties will discuss them in connection with specific changes in the rule, set forth above. They are set forth separately simply to call attention to them as problems which have arisen with the rule in its present form. Inviting comment on them does not represent a Commission view that they were wrong, but, rather, that to some extent they were reached on the basis of rather limited information, early or at least fairly early in the administration and application of the rule; and comment should be entertained before we decide whether the policies involved in these decisions (or the reverse of these policies, as some may argue) should be adopted as a permanent matter.[27]

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[26] If an exemption or waiver policy for "one-time" network programs of these types (or more generally for such network material) is not adopted, it may well be desirable to adopt more definite standards as to what are programs falling within the exemptions now specified, for "on the spot coverage" and "fast breaking news events." Comments on possible standards are invited, for example a requirement that the program must contain a high percentage (e.g., 75%) of "live" coverage, or film shot within the last 24 hours, rather than being substantially background material.

[27] The citations to these six decisions are, respectively: *Mutual Insurance Co., of Omaha*, 33 FCC 2d 583 (Wild Kingdom); *Campbell Soup Co.*, 35 FCC 2d 758, 24 R.R. 2d 856 (Lassie); *Storer Broadcasting Co.*, 35 FCC 2d 889, 24 R.R. 2d 868 (National Geographic); *Time Life Films*, 35 FCC 2d 773, 24 R.R. 2d 849 (Six Wives of Henry VIII); *American Broadcasting Companies, Inc.*, 35 FCC 2d 340 and 765, 24 R.R. 2d 628 and 862 (Olympics); and *Columbia Broadcasting System, Inc.*, 32 FCC 2d 55 and (for 1972) FCC 72-906 (October 11, 1972).

49. *Repeal of the rule.* Repeal or rescission of the rule will be considered herein, for the reasons and subject to the limitations set forth in paragraphs 13–15, above. Parties may also wish to discuss—if they urge such rescission—alternative approaches to the problem of network control over television programming. As to the latter, obviously this is an Inquiry proceeding only.

50. *The cumulative impact of the relaxations mentioned above.* We have set forth above possible relaxations of the rule in a number of different areas. It is realized that the various changes, if made in the different areas, might have a *cumulative* impact on the availability of prime time to non-network sources, even though the impact from some of them individually might not be significant. Comments on this aspect of the matter are invited, along with views as to which are the particular "problem" areas from this standpoint.

C. *Inquiry into other possible changes in the rule* (extensions of its scope, etc.)

51. This portion of the Notice—an Inquiry only, with changes along these lines to be adopted, if at all, only after further rule-making proceedings—is designed to invite comments on some changes in the rule of a more fundamental nature than those mentioned in subsection B, above. As discussed in the following paragraphs, these include: (1) extensions of the scope of the rule, either as to time or as to markets covered; and possibly extending the "off-network" and "feature film" provisions of the rule to independent stations at least in some circumstances; (2) imposing certain requirements on stations as to use of the "access period", e.g., for local programming, children's or "minority group" programs, etc.; (3) exemptions from the rule to encourage the presentation of certain types of material on either a network or "off-network" basis (children's programs, etc.)[28] and (4) changing the form of the rule so as to specify a definite hour as the "access period", which might be a later hour than the first hour of prime time which is now generally "cleared" under the rule as it operates in practice. Setting these concepts forth, and inviting comments on them, does not by any means represent a Commission view that they should be adopted, now or ultimately, and in fact some Commissioners have doubts as to whether some of them are either realistically feasible or otherwise desirable; but they have been suggested and appear to have enough relationship to public-interest objectives to warrant opportunity for exploration in this over-all proceeding. One other matter should be pointed out: as indicated elsewhere, we regard expeditious resolution of the present proceeding as highly important; and if the time frame established does not permit thorough exploration of the various concepts set forth in this subsection, that will have to wait until later, to the extent it is appropriate.

[28] This is the same type of concept involved in the general exemption for network news and public affairs programs set forth in subsection B, above.

52. The following are the concepts on which comment is invited:

(a) *Possible extensions of the scope of the rule.*

(1) Limiting network prime-time programming to 2½ rather than three hours per night, so as to clear 1½ hours for non-network use (or at least providing for this in the case of stations presenting local or network news at the beginning of prime time, so that they would have a full hour cleared for other non-network material).

(2) Extending the coverage of the rule to markets beyond the top 50, possibly to all markets having three or more network-affiliated stations.

(3) Having the "off-network" and "feature film" restrictions apply to *independent* stations (or at least independent VHF stations), to the extent of one hour at least per night.

(b) *Required local uses of the access period.* A requirement that some (or conceivably all) of the cleared "access period" time be devoted by affiliated stations covered by the rule to certain types of non-network material; including:

(i) local "live" programming (comments are invited on whether this should be required to be actually "live" or could include filmed material treated as live under the Commission's Rules).

(ii) programming designed for particular groups, such as minority groups (for example, the four specified in Section 73.680 of the Rules, and other "ethnic" groups), or children.

(iii) programming specifically designed to deal with the important problems in the station's community and coverage area as indicated by the licensee's survey to ascertain the needs, interest and problems of its community and area (generally this would be local material, but conceivably it could include syndicated programming of certain types).

(c) *Encouraging, by way of exemption from the rule's restrictions on network and "off-network" material, the presentation of the same general types of material mentioned in* (*b*), above (similar to the general exemption for network news and public affairs material covered under subsection B. above). Under such an approach, network or "off-network" material falling into these categories would not be counted for the purpose of computing the permissible amount of such material.

(d) *Specifying a particular hour as the "access period", for example the third hour of prime time* (9–10 p.m. E.T. and P.T., 8–9 p.m. C.T. and M.T.).

53. The first two matters mentioned above—extensions of the rule either as to time or as to markets covered—has been suggested by various persons largely on the basis that if "cleared time" in major markets is a good thing, why is not more such time in more markets even better? As to the matter of time, this of course would mean more prime-time availability to alternative program sources; in particular, for the stations which present news at the beginning of prime time—about half of those in the top 50 markets—it would mean a full hour of non-network programs. As to the matter of geographic extension, one specific suggestion has been made as follows: while access to major markets is almost indispensable to the success of syndicated material, general access is also significant. One index of the success of a syndicated program is a percentage figure, shown in ARB and Nielsen reports: the percentage of the nation's TV homes which are in the "areas of dominant influence" (ADI's) of stations carrying the program. It is said that, as a very rough rule of thumb, a program producer is justified in spending $1,000 per episode on the production of a program, for every percentage point the program has, or is expected to have. It is asserted that extending the "prime time access rule" would tend to increase this percentage figure somewhat, with respect to clearance in

the smaller markets, and therefore would mean more production expenditure and—perhaps, to some extent—better programs.

54. As to independent stations, it is sometimes claimed that it is unfair for *independent* stations in the top 50 markets to be free of all restrictions under the rule, for example being able to present "off-network" material during prime time in unlimited quantity. This argument is particularly made as to VHF independents, most of which in the top 60 markets are profitable, and sometimes highly so. Comments are invited on whether the "off-network" restrictions should be extended to such stations, for example so as to require an hour of prime time each night to be devoted to material which is neither network, off-network, nor feature film recently shown in the market. Comments are also invited on whether such an extension, if adopted, should be only to *VHF* stations, recognizing the particular problems which UHF stations still have.[29]

55. The second general area of inquiry is whether the public interest would be better served by requiring certain uses to be made by stations of the non-network portion of prime time, for example local programming, children's programming, or programming of particular significance to minority groups or meeting important local problems. To a degree, perhaps, this represents a shift in emphasis away from the matters stressed in the Report and Order adopting the rule, particularly insofar as this would encourage local rather than non-network syndicated material. A number of parties have expressed the view that this would be a good idea, more in accord with long-standing Commission objectives. It warrants exploration here, for one reason because of assertions (by the rule's critics such as NBC in its petition) that the rule in its present form produces mostly continuations and revivals of network series, often daytime material such as "game shows", whose proliferation does not necessarily warrant encouragement. Comments on these concepts are invited.

56. The same general type of consideration is the basis for the third general area—whether the presentation of certain types of programs should be encouraged, from network or "off-network" sources, by granting them exemption from the three-hour limitation.

57. The last matter mentioned above—changing the rule so as to provide a definite, and probably later, cleared portion of prime time—is one which has been suggested by certain syndicator parties. The argument is that, as the rule now works, the "cleared" portion of prime time is generally the first hour, 7–8 p.m. E.T., a time when the audience is somewhat smaller than it is later, and also when many children are watching. It is said that if the time were made later, such as 9–10 p.m., the audience would be larger, and, also, it would be more entirely an adult audience. The latter, it is said, would permit more "innovative" programming than that appropriate earlier, when a substantial part of the audience is young people. Comments are invited on whether such

[29] It appears likely that such a change, if adopted, would not have any marked consequences. Probably few independent stations present off-network syndicated material for more than three hours of prime time, since usually a movie is inserted into the schedule somewhere during the evening. However, the movie would be subject to the "two-year" restrictions of Section 73.658(k)(3), if such a change were made.
Comments are invited on whether another change mentioned in above, specifying a particular hour as the access period, should be applied to independent stations.

a change would be appropriate, and, if so, what form of rule could be devised to reach this result.

III. SUMMARY

58. In view of the considerations set forth above, comments are solicited on the various matters mentioned, which in summary are the following:

(a) *Gathering information as to the effect and impact of the rule and possible changes in it,* particularly on the programming being and to be presented, and the economic consequences on stations (particularly in small markets) and the TV production industry, and the economics of program production and distribution. See pars. 16–25 above.

(b) *To what extent*—in practice as well as in theory—*the rule promotes real diversity* in program sources, program ideas, and programming itself. See paragraph 18 above.

(c) *Possible adoption of a "21 hours a week" standard, or some partial move in that direction.* See pars. 29–31 above.

(d) *Other possible changes in computation of permissible programming during prime time*—a change to take care of the few "non-daylight saving time" markets, and a possible change to increase the extent to which programming arrangements acceptable for Eastern and Central time zone stations will be acceptable for Mountain and possibly Pacific, zone stations. See pars. 32–34 above.

(e) *Rules to deal with sports events,* in particular late-afternoon "runover" situations and "pre-game" shows; and also a possible rule listing a few important events (the Olympics, the World Series, etc.) which might be suitable for presentation without regard to the basic limitation of the rule. See pars. 35–36 above.

(f) *Relaxation of the "off-network" restrictions; and modification of the "feature film" restrictions,* in Section 73.658(k)(3), in the former respect to permit a limited amount of off-network material and, possibly, a rule to permit generally the use of off-network and new material in a "package", along the lines urged by MCA, Inc. Clarification of the "feature film" provision, as to feature films shown as network material and feature films produced primarily for TV rather than theatre exhibition, is also proposed. See pars. 37–44 above.

(g) *Continuation of waiver or exemption with respect to news and public affairs programs,* after October 1, 1973: the waiver for network news following a full hour of local news, and for "one-time" network news or public affairs programs, or documentaries, or a more general exemption for this type of network material. See pars. 45–47 above.

(h) *Repeal of the rule.*

(i) *The possible cumulative effect of relaxation* in various areas mentioned (par. 50, above).

(j) *Possible extensions of the rule or further exemptions,* as to which this is an Inquiry proceeding only. See pars. 51–57 above.

59. This Inquiry and Rulemaking proceeding is instituted pursuant to authority contained in Section 403 and Sections 4(i) and 303 (b), (g), (f), (i), and (r); 307(d); 308(b); 309(a); 313, 314 and 315 of the Communications Act of 1934, as amended.

60. Pursuant to applicable procedures set forth in § 1.415 of the Commission's Rules, interested persons may file comments on or before December 22, 1972, and reply comments on or before January 29, 1973. All relevant and timely comments and reply comments will be considered by the Commission before final action is taken herewith. In reaching its decision in this proceeding, the Commission may also take into account other relevant information before it, in addition to the specific comments invited by this Notice. For reasons stated in pars. 13–15, above, parties are herewith notified that the above timetable, which appears adequate, will be adhered to.

61. In accordance with the provisions of § 1.419 of the Rules, an original and 14 copies of all comments, replies, pleadings, briefs, and other documents shall be furnished the Commission. Material filed will be available for public inspection during regular business hours in the Commission's Broadcast and Docket Reference Room at its headquarters in Washington, D.C.

FEDERAL COMMUNICATIONS COMMISSION,

BEN F. WAPLE, *Secretary.*

CONCURRING STATEMENT OF COMMISSIONER ROBERT E. LEE

I concur in the Notice of Inquiry and Proposed Rule Making. I hasten to add that this should not be interpreted as dissatisfaction with the existing rule but rather as an opportunity to review it with the expectation that the objectives of the rule may be improved.

CONCURRING STATEMENT OF COMMISSIONER H. REX LEE

I concur in the decision to initiate an inquiry into the effect and operation of the prime time access rule (Section 73.658(k) of the Commission's Rules) primarily because, as a general proposition, I favor an administrative agency's review of past regulation. However, my concurrence should not be interpreted in any way as either a repudiation of the rule or a prejudgment of the inquiry proceeding.

I would have preferred to delay the Commission's review of the prime time access rule in order to permit a more meaningful assessment of its impact during the current television season, *i.e.*, 1972–1973, when the full force and effect of its provisions become applicable. Although I have no preconceptions about the use of prime time repeat material by the networks, as the majority decision indicates, there appears to be a relationship between the prime time access rule and television "re-runs." In fact, it is even suggested that "parties may wish to prepare their comments herein with this in mind." It seems to me that a more orderly course of action would be to consolidate the prime time access inquiry with an investigation into the ramifications of a limitation on network television "re-runs."

One other matter deserves consideration. At the time the Commission adopted the prime time access rule in 1970, I indicated that I was in favor of a provision which would have exempted news documentaries from the scope of the rule. It was my belief that failure to adopt such an exemption would tend to discourage the network presentation of news documentaries. I would hope that interested parties would comment on the validity of my earlier prediction in light of actual experience under the rule.

SEPARATE OPINION OF COMMISSIONER NICHOLAS JOHNSON CONCURRING IN PART AND DISSENTING IN PART

In 1970, after years of investigation and analysis, this Commission concluded that the domination of the television program production market by the three networks required Commission action. As part of

that action, the Commission required that television stations in the top 50 markets take no more than three hours per night from the three networks. At least one hour had to come from independent producers, including the stations themselves. For at least one hour per night, there would be 150 buyers of television programming (three network affiliates in each of so markets) rather than three networks.

In the words of the Commission:

> The public interest requires limitation on network control and an increase in the opportunity for development of truly independent sources of prime time programming. Existing practices and structure combined have centralized control and virtually eliminated sources of mass appeal programs competitive with network offerings in prime time.
>
> In light of the unequal competitive situation now obtaining, we do not believe this action can fairly be considered "anti-competitive" where the market is being opened through a limitation upon supply by three dominant companies.[1]

In affirming the Commission's action, the U.S. Court of Appeals for the Second Circuit commented:

> To argue that the freedom of networks to distribute and licensees to select programming is limited by the prime time access rule, and that the First Amendment is thereby violated, is to reverse the mandated priorities which subordinate these interests to the public's right of access. . . . The evidence demonstrates that despite the fairly wide range of choice available to licensees, they have consistently decided to limit themselves to one program source during prime time. Thus, while the rule may well impose a very real constraint on licensees in that they will not be able to choose, for the specified time period, the programs which *they* might wish, as a practical matter the rule is designed to open up the media to those whom the First Amendment primarily protects—the general public. (emphasis in original).[2]

Now this Commission is embarking on a new proceeding to examine the functioning of the prime time access rule, propose modifications of it, and to consider its demise. Since I would have followed a substantially different course, I am compelled to dissent.

At the outset, one should note the extreme handicaps under which this rule has functioned in the short time it has been in effect. First, the Commission substantially undercut it by permitting off network material to fill the access time during the first year of the new rule. Second, roughly 75% of all requests for "waiver" of the rule have been granted by this agency. Third, the rule has never enjoyed unanimous support either here or in the White House. (Recently the trade press reported three sure votes for repeal of the rule.) The White House continues its partisan wooing of certain segments of the Hollywood community and networks by promising favorable FCC action.

I hasten to add that I believe my colleagues when they say that no decision has been made, that the presumption favors retention of the rule, and that they are perfectly willing to listen to arguments as to why the rule should be retained and even expanded. And I believe they are going to be surprised by the degree of support the rule will command in this proceeding. I doubt that the rule will be scrapped, or that there will be a return to the status quo, and I will have more to say about this later.

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[1] Network Television Broadcasting, 23 F.C.C. 2d 382, 894–95 (1970).
[2] Mt. Mansfield Television, Inc. v. F.C.C., 442 F.2d 470, 478 (2 Cir. 1971) (footnote omitted).

Another difficulty with this proceeding is the relative lack of information and analysis before the Commission regarding the basic facts surrounding this rule. As I have said over and over again, I believe this Commission simply must have a policy planning and analysis capability to provide the information necessary for rational decisionmaking. I would have hoped that this agency might have an analytic capability for an ongoing analysis of the structure of the television industry. Instead, we rely on not very systematic splurges in the Delphi technique, and we usually ask only those who have an economic interest in a policy outcome. But with the understanding that what follows is scarcely better than speculation, I think it useful to examine the effects of the rule on the principal groups affected by it.

Consumers. "Consumers" is the economist's euphemism for the viewing public. The quick and dirty analysis is that the apparent impact of the rule viewers are watching less television, and watching stations other than network affiliates. Perhaps, one might argue that therefore, consumers are watching programs (or doing other things) that bring them less satisfaction than the network programs did, and that there is therefore a net loss of consumer satisfaction. This analysis neglects some very hard questions about changes in consumer tastes and preferences, as well as problems with comparisons of interpersonal utility preferences.* And the evidence to support it is ambiguous at best. Counterbalanced against it is some evidence of increased choice, and more local programming. There is apparently some evidence of less network news and public affairs, and children's programming being deferred to later in the evening.

Networks. The dollar and cents effect appears minor, except that ABC, which supports the rule, seems to have been helped competitively.

Top-50 market network affiliates. This group appears to be better off financially as a result of the sale of commercials in purchased programming, rather than the revenues from network programs.

Smaller market affiliates. The networks might have elected to program this group for their affiliates in markets below the top 50. They choose not to. As a result, these stations have been adversely affected, although less than might have been expected.

Independent stations. There seems no doubt that these stations have been helped, in that they are now competing on a more equal footing with affiliates.

Program producers. Those who produce programs for the networks have probably been hurt; those who produce independent programming have been helped. There seems to be more imported programming in prime time—for whatever reason. And the overall budget for program production may have declined as lower cost programming is produced and shown.

The FCC. The objective of the rule—deconcentrating the television program production market—seems to have been achieved, although the magnitude of that achievement in the scheme of things is in question. The administration of the rule has created endless headaches, and simplified FCC administration plays no small part in generating the present proceeding.

My own approach to this proceeding would have been to take a substantially different course. The majority is, in effect, conducting a "go-no-go" proceeding on a rule that is barely into a trial period. It sets rigid schedules for consideration, without knowing whether it or other parties are likely to be in a position to make a rational policy choice. The majority also apparently believes that it makes sense to consider a complete return to the network power situation that existed prior to 1970. Unless something has changed since 1970 in the basic competitive relationships in the television industry, I don't see how the Commission can return to that unsatisfactory situation. I see no evidence that such a change has occurred. The majority cites none.

Former Commissioner Cox, in his usual insightful way, predicted our current position when concurring in the adoption of this rule in 1970:

> If [the rule does not have the desired result], I think the networks and their affiliates may face even more drastic action. As indicated by its filings in this proceeding, the Department of Justice has serious concerns about the state of the market for television programming. If the Commission waters down its action here, or if the new rule does not in fact open up the market, then I think it possible that the Department will proceed under the antitrust laws to apply the policies developed in the motion picture industry to broadcasting. Or the Commission itself, if faced with the permanent prospect of a slowly constricting program production industry, may decide that the only alternative is to attempt some kind of detailed regulation of the networks' program practices.
>
> * * * * * * *
>
> I therefore hope that, after a necessary period of readjustment, the rule we have adopted will generate a substantial flow of new programming for sale direct to stations and cable systems, without passing through the network selection process. If it does, I think we will have a healthier television industry. If it does not, then I fear that the industry may very well undergo very serious changes in form and character.[3]

There is an antitrust suit pending in California, which followed an FCC waiver of the prime time access rule in major part for the first year, combined with an FCC stay of other aspects of its action which remained in effect for about a year after the rules were affirmed in court. I am not sure it is cause for industry celebration that the FCC is considering abandoning rules adopted to deal with a serious competitive problem.

I would not have turned this proceeding into a "go-no-go" rulemaking, nor would I impose a rigid decision making schedule, when it is not known that the facts necessary for a rational decision are going to be available. And if the rule is to be abandoned, it must be replaced with a substitute calculated to meet the problem of network power, and designed to accomplish more than would be accomplished if the rule were retained. It was for these reasons that I made certain suggestions to my colleagues for areas of inquiry to consider alternatives to the rule. Some were incorporated and I need not dwell on them. Many were not and I want to discuss them here in the hope they will generate thought and perhaps future consideration.

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[3] Network Television Broadcasting, 23 F.C.C. 2d 382, 427–28 (1970).

Some concern was expressed that a more thorough proceeding would be delayed. But surely a graduated set of response dates would permit all the majority seeks in terms of time schedule.

To introduce the subject areas I believe warrant comments and inquiry, I should like to note some views expressed in 1970, at the time the prime time access rule was adopted. In the only telling portion of his dissent, Chairman Burch, in an opinion joined by then Commissioner Wells, said:

> [R]ather than spending years on a rule of this nature, the Commission must concentrate on the obvious alternatives which have a different economic base and thus make a genuine contribution to diversity. These alternatives do exist and have not yet come to fruition.
>
> First there is subscription television, which has a different economic base and and can present programming that is not necessarily designed for a mass audience and will still be economically attractive for an entrepreneur. There is cable casting, a technology which makes multiple channels available and which by its very nature changes the entire economics of programming. There is the noncommercial educational television system, which, with sufficient and appropriate funding, can make a tremendous contribution to diversity.[4]

Noble words and an inspiring program for Commission action. I might have endorsed it myself: it is certainly consistent with my oft-expressed preference for competitive solutions rather than regulatory ones. The statement seems to acknowledge that a serious problem exists. The only question is the best solution and how to bring it about.

But what has happened in the past two years? Subscription television, shackled with restrictions, is still non-existent, and the thrust of Commission policy is toward ever more stringent restrictions. Cable television is strait-jacketed in a policy born of a political deal calculated to blunt its promising competitive benefits—not to mention the morass of more than 1000 applications pending and stymied here. And public broadcasting is suppressed in a political power play and capture to which I heard no protest from the Commission majority. In each of these areas, the FCC abandoned any thought of a leadership position. I do not oppose the consideration of alternatives so long as it is not done as mere chicanery to effect delay and postpone solutions opposed by powerful interests.

If the problem, most broadly stated, is network domination, and if there is still interest in discussing alternatives, let them be considered. What follows are ideas. The majority refused even to include them in its notice. I neither support nor oppose them. But I do think they are worthy of inquiry.

(a) As an alternative means of increasing the number of buyers for television programming, and increasing the diversity of programming available to viewers, UHF stations (and vacant or unassigned UHF allocations) could be realigned into stations with significantly higher power, capable of serving wide regions, with the possibility of attracting audiences to compete with network affiliates, and the possibility of interconnecting them into a new network.

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[4] Network Television Broadcasting, 23 F.C.C. 2d 382, 416 (1970).

(b) Networks could be required to allow every station in the market to bid for network programming on a per-program basis, giving every station an opportunity to acquire network programming. Independent producers would also compete for station buys without having to face a fixed network affiliation for major stations in the market.

(c) Networks could be required to allocate their prime time programming on a pro rata basis among all the stations in the market. For instance, if there were six commercial stations in the market, and three networks each programming four prime time hours per night (84 hours total network prime time per week), no station could receive more than two network hours per night, or 14 hours per week. The economic benefits of networking would be spread among *all* stations in the market UHF and VHF alike. Independent producers would also have a prime time market comparable to networks. New stations coming on the air would have an assured source of programming.

(d) Networks could be required to program no more than 25% reruns per year. This question is directly related to issues and questions concerning the prime time access rule, and should be considered with it.

(e) Networks could be required to divest themselves of television program production facilities and talent agencies as well as any remaining syndication activities domestically or in foreign markets. This agency has apparently made an informal decision, never actually considered by the Commissioners, to do nothing about the Department of Justice suit against the networks, although arguments are being made that the subject matter of the suit is a matter within the FCC's primary jurisdiction. I dislike the continuing erosion of the FCC's power to affect the industries it regulates, but certainly there is no more powerful argument for that erosion than inaction, or action that fails to meet public interest needs, whether it be under the Communications Act or the antitrust laws.

(f) A final alternative could involve a seeming strengthening of the networks' monopoly position in an effort to, in fact, reduce it. One of the oft-overlooked reasons for the "quality" of the BBC's programming is that it is not one network but two. Thus, the "opportunity cost" of putting on minority appeal programming is virtually eliminated. (Opportunity cost is an economists' expression for what you lose by choosing a particular course of action. When an American commercial network chooses to put on programming that does not maximize audience it not only loses the production costs of that program, it also loses the "opportunity" to make the much greater revenue that a mass appeal program would create.) If a diversity of programming is what is desired, that can be created by creating a monopoly as well as by eliminating one. For example, if a means could be found whereby an individual network not only could, but would be required to, program every *station* in a given market, the net effect might well be *more* diversity than that created by three networks, each trying to copy each other's efforts to attract the entire audience (and ending up with about one-third each). Mass appeal programming would undoubtedly go on one, two, or three of the channels. But even it would be counter programmed—that is, sports on one, a movie on another, and so forth. And the remaining channels

would undoubtedly be programmed with minority appeal programming of various kinds—in an effort to attract to television persons who would not otherwise be watching any television at all, and thereby increasing the total television viewing audience for the network. In exchange for this seeming monopoly advantage, we could require that no network could program more than one hour a day, or whatever, to reduce the barriers to entry into the networking business and increase the number of networks. If there were hours when no networks were programming at all, the proposal would, to that extent, create a market for the programming of independent producers as well.

(g) Networks or stations could be required to present a certain amount of material designed for particular groups (see section b, paragraph 52 of the majority Notice) or news and public affairs each night or each week as a condition to a recision of the rule.

These are ideas I believe relevant to any consideration of where the FCC goes with the prime time access rule. No doubt there are others. No doubt some could be rejected quickly once they were subjected to detailed analysis. I express no preferences for any. Each has a similar goal to that of the prime time access rule, however, to improve the competitive, free private enterprise functioning of the television program production market. Several alternatives approach the problem from a wholly different direction than that of the prime time access rule.

The FCC ought to be in the business of freely exploring, analyzing, and testing the alternatives for the benefit not only of the viewing public but the industries and unions involved as well. Its refusal to do so prompts this dissent.

*"Utility preferences" is economists' jargon for describing the variety of tastes and desires of individual consumers. Any single viewer-consumer has his own preferences for television programming—as well as for a host of other ways in which he might spend his time. The difficulty arises when one tries to add together the preferences of large numbers of consumers to decide whether consumers as a whole are better off or worse off as a result of alternative sets of programming fare. Suppose the effect of the prime time access rule is to eliminate certain network programming and reduce the number of viewers watching any television program, or that different programs are watched than would be the case without the rule. Then, so the argument goes, the total consumer-viewer satisfaction is less than when the additional network programs were available. The problem with this analysis is that no one knows how much loss a viewer suffers by doing something other than watch television, or by watching one program rather than another. There is a question whether consumer satisfaction for individuals can be added at all. No one knows whether those viewers who stopped watching television, or shifted to other programs because of the prime time rule, are essentially indifferent to the change. Viewers who watch the programming that replaced network programming because of the rule may find the new programming greatly preferable to their prior alternatives. And even this analysis presupposes that television watching is a net consumer benefit. The viewer is not, of course, the consumer—he is the product

sold by the advertiser (who *is* the consumer). Programming is virtually irrelevant in such a market analysis. (Various forms of subscription television, by contrast, *do* turn the viewer into a market place participant in the program selection process.) Nor is television watching necessarily a benefit at all. See the Kerner and Eisenhower Commission Reports, the Surgeon General's Report on violence in children's programs, *How to Talk Back to Your Television Set* and *Test Pattern for Living*. Mason Williams has said, "I finally decided the best I could do for television was not at all." After observing the industry's insensitivity to the impact of programming and commercials on small children (during the FCC's children's television hearings) I was prompted to recommend legislation to Congress making it a felony for anyone to keep a television set receiver in a home containing children under the age of six. In short, I am not sure that "utility preferences" is a concept that can contribute much to our analysis of the prime time access rule. But as long as we give Nobel Prizes in economics for the idea, the least the FCC can do is to hear it out.

STATEMENT OF COMMISSIONER BENJAMIN L. HOOKS CONCURRING IN PART; DISSENTING IN PART

IN RE: Notice of Inquiry and Proposed Rule Making in Prime Time Access Rule Matter.

There is no question in my mind that a re-examination of the direction and effect of the "Prime Time Access" Rules is necessary and desirable. I concur in initiating this analysis.

However, inasmuch as we are focused on the subject of Prime Time broadcast fare, I would have specifically requested an exploration—through comments and otherwise—of the possibility of requiring that a certain share of Prime Time be dedicated to local news and public affairs should the present Prime Time Access strictures be extinguished. See, in this connection, Notice of Inquiry In re: Formulation of Policies Relating to the Broadcast Renewal Applicants, stemming from the Comparative Hearing Process (F.C.C. 71–159, Docket No. 19154 released February 23, 1971), 27 F.C.C. 2d 580 (1971).

F.C.C. 72–956

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of
REQUESTS FOR WAIVER OF THE "OFF-NETWORK" PROVISIONS OF THE PRIME TIME ACCESS RULE (SECTION 73.658(k)(3)) FOR "NATIONAL GEOGRAPHIC" PROGRAM MATERIAL (STORER BROADCASTING CO., CHRONICLE BROADCASTING CO., SCRIPPS-HOWARD BROADCASTING CO.)

MEMORANDUM OPINION AND ORDER

(Adopted October 26, 1972; Released October 31, 1972)

BY THE COMMISSION: COMMISSIONERS ROBERT E. LEE, JOHNSON, AND H. REX LEE DISSENTING; COMMISSIONER HOOKS CONCURRING AND ISSUING A STATEMENT.

1. The Commission here considers three requests for waiver of the "off-network" provisions of the prime time access rule, Section 73.658 (k)(3), which, effective October 1, 1972, provides that for stations in the "top 50 markets", the prime time from which network programming is excluded (i.e., one hour a night) may not be filled with "off-network" material, programming which has previously appeared on a network. All these requests relate to the one hour "National Geographic" program series, which ran on CBS at the rate of about 4 programs a year from 1965 to 1971 and was subsequently distributed in syndication, and which these licensees wish to present on their stations during prime time, as they have recently been doing. The request of Storer Broadcasting Company (Storer) is contained in a "Petition for Reconsideration" timely filed following Commission denial of its original waiver request in June 1972 (FCC 72–572, adopted June 28 and released July 11, 1972, 24 R.R. 2d 868). The other two requests are original waiver requests filed in June, shortly before the decision, and were not dealt with therein.[1] The Storer request involves three of its stations, those in Atlanta, Detroit and Milwaukee; Chronicle's request concerns its Station KRON–TV, San Francisco; and Scripps-Howard's request concerns its Station WCPO–TV, Cincinnati. These two parties filed supplements to their requests in August 1972, following the *Storer* decision.

[1] The other petitioning parties are Chronicle Broadcasting Co. (KRON–TV) and Scripps-Howard Broadcasting Co. (WCPO–TV).

Material in the Chronicle and Scripps-Howard Requests

2. The facts as to the Storer situation were set forth in the Commission's decision mentioned, and need not be repeated here. Those of the other two parties are essentially the same; all three licensees have acquired the right to present 24 or 25 of these one-hour programs, twice each, during a fairly extensive period. The WCPO–TV contract runs from April 1972 until March 1975; the KRON–TV contract period is not stated. Chronicle emphasizes the importance of this material for "family" viewing, including children, as part of its early-evening program lineup. This features a first-run syndicated program ("Wide, Wonderful World") from 7 to 7:30 weekdays, followed from 7:30 to 8 (from Monday to Friday respectively) by "Lassie", NBC Specials, "Life Around Us", "Mouse Factory" and "Circus", the latter three first-run syndication. On Saturdays the 7–8 hour is devoted to "National Geographic" (with a first-run syndicated program "Seven Seas" interspersed from time to time); and on Sundays the time is devoted to "Wild Kingdom" and the first part of the NBC *Disney* program. As described in the original petition and supplement, KRON–TV's National Geographic material has wide acceptance, being the most popular program at its hour and including (according to the May 1972 ARB survey) 201,000 TV homes, 375,000 total viewers and 54,000 children age 6–11. This is said to be particularly impressive because this was the second run on KRON–TV in addition to earlier CBS showings on another station. The Scripps-Howard request asserts that WCPO–TV likewise carries this material from 7 to 8 (starting this September) and wishes to continue to do so, so that this desirable material may reach a large prime-time audience; it is said that these programs are of great educational value, as well as otherwise, and the station will promote them extensively among area schools. It is also asserted that, while all of this material ran on WCPO–TV as a CBS program, 60% of it has not been shown within the last 4 years.

3. These parties also urge some of the points mentioned by Storer and noted in our earlier decision, including the minimal network interest in these programs (which are and have been independently produced, with the network having no financial interest), and possible benefit to the Society from wide syndication distribution. Chronicle makes one additional argument: that nothing should turn on the fact that no *new* material will be added to the series, which is inevitable since the Society markets its product initially on a network basis. It is said that this should not bar the presentation of this highly desirable material, which is really of an "independent" nature, and whose presentation would encourage non-network producers generally.

Material in the Petition for Reconsideration and Supplements

4. The Storer "Petition for Reconsideration", and the supplements to their original requests filed by the other two parties in August, are largely devoted to argument concerning the Storer decision and other Commission actions involving "off-network" material, including the *Six Wives of Henry VIII* decision adopted the same day as *Storer*

(Time-Life Films, FCC 72–573, 24 R.R. 2d 849). Storer urges that the rather brief conclusions in the Commission's decision do not begin to deal with the various grounds for waiver urged in Storer's original request (and noted at an earlier point in our decision), or explain why our earlier *Wild Kingdom* decision, granting waiver for that program, is not a precedent here (*Mutual Insurance Co. of Omaha*, 33 FCC 2d 583 (February 1972)). This, it is claimed, is legal error. Storer also notes the fourth decision involving "off-network" programming, that involving the Lassie program (*Campbell Soup Company*, FCC 72–500, 24 R.R. 2d 856) and claims that it too, while resulting in denial of waiver, made a distinction which requires waiver in this case: that between fact (*Wild Kingdom* and now *National Geographic*) and fiction (*Lassie*). In brief, Storer's argument is that National Geographic is an *a fortiori* case to *Wild Kingdom*, since both are factual and National Geographic involves fewer episodes and thus less impingement on the availability of time to non-network sources; on the other hand, the distinction made in granting waiver to *Six Wives of Henry VIII*—that only six programs are involved—is not a valid one as compared to denial here, since *Wild Kingdom* involved even more episodes. In the latter connection, the impact on the availability of prime time for new material, Storer also renews its earlier commitment that none of its stations will carry Wild Kingdom, and adds that the two which are CBS affiliates will carry the CBS National Geographic programs and thus whatever "new" material is available in that series, and that it will show any program under the waiver only once. It is also claimed that the impact will not be so great, because it is unlikely that any of its three stations involved would carry all 25 programs during 1972–73, and, as to its Milwaukee station, that station now carries an additional half-hour local news in prime time so that very few National Geographic programs on it would preempt any access time. In sum, Storer asserts that Chairman Burch was right in asserting that these decisions, taken together, are illogical, and that it seeks waiver "to obtain some reasonable and much needed flexibility in scheduling access time programming of established quality."

5. The supplement to the Scripps-Howard request makes somewhat similar arguments, particularly as to the amount of time involved in its National Geographic request and the *Six Wives of Henry VIII* situation. It is claimed that the difference between six 90-minute programs and 24 one-hour programs is "negligible" and that, in any event, what is involved in the National Geographic cases is, at most, waiver for five stations, whereas the Henry VIII waiver, to the owner of the program, could mean sale to stations (and resulting impingement on prime time) in all of the top 50 markets. It is also asserted, as to the value of the program, that *Henry VIII*, while of high quality and merit, is fiction of an entertainment nature and deals with the "dead past", while National Geographic material is factual and more relevant and current, particularly to the substantial large-city ghetto audience.

109-015—72——7

DISCUSSION AND CONCLUSIONS

6. After careful consideration of these three requests, and the matters urged and discussed above, we are of the view that the June 28, 1972 decision should be reversed, and waiver of Section 73.658(k)(3) should be granted to Storer and the two other petitioners with respect to the National Geographic program. Essentially, the reasons for this decision are the same as those for grant of the *Wild Kingdom* waiver mentioned above: the absence of more than minimal network control over, or interest in, the program (acquisition only of the right to network exhibition), and the distinctive (and meritorious) character of the material involved, a factual presentation of nature and wildlife like the program involved in the earlier decision. Thus, the program does not present the same problem as that involved in the *Lassie* decision—a fictional entertainment program, similar in that respect to a great deal of other network and non-network material, so that it would be difficult to deny waiver to similar material if it should be requested (see *Campbell Soup Company*, par. 6, 35 FCC 2d 758, 760–761). It is to be noted, of course, that one aspect of the situation is different from *Wild Kingdom*, in that no new material will be added to the "off-network" series (since new episodes are still presented by the Society initially on a network basis); but this is of less importance where the program was presented on the network only four times a year, rather than as a regular weekly series, and a good deal of it will thus be material which has not had network exposure in the recent past (see par. 2, above). The cause of program diversity is benefited under these circumstances.

7. In the June 28 decision denying waiver to Storer, we noted the undesirability of granting continuing waivers in these "off-network" cases, which would significantly reduce the amount of prime time available to new non-network material. This was, and is, a very important consideration. However, upon further evaluation of the matter, we are of the view that the point has not yet been reached where this impingement has reached significant proportions.

8. In the last connection, one important consideration is that it does not appear that there will be any substantial number of "off-network" waivers for other programs in the near future. This is true for two reasons. First, the programming pattern—what material stations have, and what they will present—is probably pretty much fixed by now, for the 1972–73 year or at least the first half of it. Second, in considering today another matter involving "off-network" programming, we have adopted somewhat more restrictive procedures concerning such waivers for the immediate future. Pending decision in the over-all prime time access rule proceeding adopted today (Docket 19622, of which this subject is an important part), no request for waiver of the "off-network" restrictions as to a particular program generally (either by the program supplier or a licensee) will be acted on for 45 days after public notice of it is given and interested parties have the opportunity to comment. Moreover, if any such requests are tendered, it may well not be appropriate to act on them, as a general matter, until

decision in the over-all proceeding, which should occur fairly early next spring.

9. Therefore, waiver is granted to the five stations mentioned with respect to the *National Geographic* program. However, it is appropriate to limit this grant to the 1972–73 year, or until October 1, 1973.

10. Accordingly, IT IS ORDERED, That waiver of the "off-network" restrictions of Section 73.658(k)(3) of the Commission's Rules IS GRANTED, until October 1, 1973, with respect to the National Geographic program, to Stations KRON–TV, San Francisco, California, WAGA–TV, Atlanta, Georgia, WCPO–TV, Cincinnati, Ohio, WITI–TV, Milwaukee, Wisconsin and WJBK–TV, Detroit, Michigan.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

CONCURRING STATEMENT OF COMMISSIONER BENJAMIN L. HOOKS

My acquiescence in this decision in no way reflects my attitude, either pro or con on the overall desirability of the "Prime Time Access Rules" as presently constituted.

However, inasmuch as this agency has granted a number of waivers to permit the presentation of shows considered "distinctive and meritorious," I see no reason here to arbitrarily discriminate against the "National Geographic" productions. It is solely for that reason that I join the majority.

F.C.C. 72-971

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of AMENDMENT OF PART 81 OF THE RULES CONCERNING THE DUPLICATION OF SERVICE BY PUBLIC COAST STATIONS; TO REQUIRE JUSTIFICATION FOR ASSIGNMENT OF MORE THAN ONE WORKING FREQUENCY TO PUBLIC AND LIMITED COAST STATIONS; AND TO REQUIRE LISTENING WATCHES BY LIMITED COAST STATIONS ON WORKING FREQUENCIES	Docket No. 19360

MEMORANDUM OPINION AND ORDER

(Adopted November 1, 1972; Released November 6, 1972)

BY THE COMMISSION: COMMISSIONERS JOHNSON AND WILEY CONCURRING IN THE RESULT; COMMISSIONER H. REX LEE AND HOOKS ABSENT.

1. The American Telephone and Telegraph Company (AT&T) and A. W. Brothers (Brothers) have filed petitions for reconsideration of our Report and Order in this Docket released July 5, 1972 (FCC 72-557, 37 FR 13548, July 11, 1972). The petitioners complain, essentially, that the changes in Section 81.303(b)(2) and 81.304(f) of the rules promulgated by that Report and Order containing criteria for establishing additional VHF public correspondence services are too stringent and prevent relief in situations where assigned frequencies are heavily overloaded.

2. More specifically, AT&T asserts that:

a. In Section 81.303(b)(2), the required channel occupancy of 40% to qualify for an additional working frequency for an existing station (or 50% for the establishment of a new station) for a 12-hour daily period over any three 5-day operational periods, should be for a 3-hour period for any four days in a ten day period;

b. The definition of "boating locality" in that rule section as a port, harbor or marina with facilities for the specified number of vessels equipped with radio, should be amended by specifying that the vessels be equipped with radio to operate on public correspondence channels; and

c. The specified 30 miles in Section 81.303(b)(2) beyond which new stations could be authorized under the enumerated conditions should be deleted, or at least increased to 50 miles so that greater protection would be afforded to an existing licensee.

3. Brothers, essentially, repeats the argument and recommendation made in his earlier comment filed in response to the Notice of Proposed Rule Making in this Docket. Brothers repeats that the channel load should be 10% to justify establishment of additional facilities. He

again referred to the technical data for the Rural Electrification Administration furnished with his earlier comment, which we rejected for the reasons explained in our Report and Order in this Docket.

4. On the basis of the additional information and traffic studies furnished by AT&T, we will grant petitioners' requests to the extent of adopting the channel occupancy criteria recommended by AT&T, as set forth in the attached Appendix. We believe this will substantially provide both AT&T and Brothers with a measure of relief. In making this change, we have some concern that this more liberalized criteria for assigning additional working frequences may prematurely exhaust all nine of the available VHF public correspondence frequencies and thereby prevent the establishment of service in new areas later in the 1970's when the VHF conversion program is fully implemented. On the other hand, there appears to now be an urgent need for additional frequencies to provide service, especially in congested areas where service is obtained only after unreasonably long periods of as much as several hours. Of these two considerations, we believe the present, rather than the potential, need is more paramount and necessitates remedial action now. In determining the number of months that must be included in any channel traffic study used as a basis for establishing additional facilities, we are specifying a two month period for an existing station licensee when requesting an additional frequency, and three months for an applicant for a new station based on channel use by an existing station. This will allow an existing licensee a reasonable opportunity to remedy a situation where inadequate service exists before an application for a new competing station may be filed.

5. With respect to AT&T's assertion that the new rule provision permitting the establishment of a new station at least 30 miles from an existing station, under the conditions specified, should be deleted or increased to 50 miles, we do not agree. As stated in paragraph 8 of our subject Report and Order, this new 30 mile provision provides substantially more protection for an existing station than before, and for reasons fully explained in that paragraph, we do not believe that more protection is desirable at this time when this VHF maritime service is in a process of being developed incidental to a general conversion from the medium to the very high frequency band in the maritime service bands. As this conversion is completed later in this decade, the matter can be reviewed in the light of information then available to determine if greater protection for existing stations is needed in order for the stations to remain economically viable to provide adequate service in the public interest. AT&T's petition, insofar as it is related to this provision, will therefore be denied.

6. We are not persuaded that AT&T's suggestion is reasonable or desirable that the definition of a boating locality be changed to specify that the required number of vessels that must be equipped with radio, must be further equipped to operate on public correspondence channels. Such a provision could impose a requirement on an applicant to furnish information which he may have no ability to acquire. Information concerning the number and types of non-transient vessels in a boating locality may usually be easily obtained from the port or marina operators, whereas information concerning the channels on which such

vessels are equipped to operate would ordinarily be obtainable only from a vessel owner who may, or may not, be cooperative in furnishing such information. Such a provision could be counter productive in our program to establish adequate VHF public coast facilities. Ordinarily a vessel operator would not equip his ship station to operate on local public correspondence channels when there is no nearby coast station with which to communicate. The vessel operator would not know which of the nine public coast channels to install, and he may, until a coast station is in operation, prefer to use his available channels for other purposes. Under these circumstances, to require a coast station applicant, as a condition precedent to the filing of an application, to show that vessels are equipped to operate on local public correspondence frequencies could, in effect, impose a condition which could never be met as a practical matter and thereby prevent the establishment of any new stations. For these reasons we will not adopt AT&T's suggestion that our definition of a "boating locality" include a requirement that boats be equipped to operate on public correspondence channels.

7. In view of the foregoing, IT IS ORDERED, that the Petitions for Reconsideration filed by American Telephone and Telegraph Company, Inc. and A. W. Brothers ARE GRANTED to the extent that the criteria is changed for determining channel occupancy as a basis for applying for additional working frequencies for VHF Public Coast stations, or for new stations of this class, as shown in the attached Appendix and in all other respects the Petitions ARE DENIED.

8. IT IS FURTHER ORDERED, pursuant to the authority contained in Section 4(i) and 303 (b), (f), and (r) of the Communications Act of 1934, as amended, Part 81 of the Commission Rules IS AMENDED, effective December 15, 1972, as set forth in the attached Appendix.

9. IT IS FURTHER ORDERED, that this proceeding IS TERMINATED.

BEN F. WAPLE, *Secretary.*

APPENDIX

Part 81 of the rules is amended as indicated below.

1. Section 81.303(b) is amended to read as follows:

§ 81.303 *Duplication of Service.*

* * * * * * *

(b) When calculated in accordance with Subpart R of this Part, the service areas of two or more Class III–B Public Coast stations shall not be duplicated in more than 20% of the navigable waters within the service area of any station: Provided, however, That, (1) an application may be filed for a station to serve a boating locality in which no station is located and which is at least 30 miles from an existing station serving primarily another locality, and for purposes of this rule section a boating locality is defined as a port, marina or harbor with docking or servicing facilities for not less than 10 commercial or 50 noncommercial vessels that are equipped with radio; or (2) an application may be filed for a station having a service area which duplicates more than 20% of the service area of an existing station if the assigned channel occupancy of the existing station exceeds 50% during the station's specified busiest hours of operation. An application based on channel use of an existing station and proposing duplication of more than 20 of the coverage area of the existing station, shall be accompanied by a record of monitorings or other satisfactory information to show that

for any 4 days within a ten consecutive day period of station operation in each of three months immediately prior to the filing of the application, the assigned frequency, or frequencies, was in use for exchanging communications at least 50% of the 3 busiest hours of each day, of which not more than half of the use time may consist of waiting or set up time.

* * * * * * *

2. In Section 81.304, paragraph (b) (22) is amended to read as follows:

§ 81.304 *Frequencies available.*

* * * * * * *

(b) * * *

(22) To the extent practicable, the order of assignment of public correspondence channels will be in accord with the U.S. priority numbering system, as follows:

Priority No.		Transmit (MHz)	Receive (MHz)	Channel designator
U.S.	I.T.U.			
1	1	161.900	157.300	26
2	2	161.950	157.350	27
3	3	161.850	157.250	25
4	4	161.800	157.200	24
[1] 1	6	162.000	157.400	28
5	13	161.825	157.225	84
6	14	161.975	157.375	87
7	15	161.925	157.325	86
8	17	161.875	157.275	85

[1] Channel 28 will be assigned interchangeably with Channel 26 as the first priority number.

In assigning frequencies in the band 156–162 MHz to a Class III–B Public Coast station, initial grants will be limited to one working frequency. An additional frequency may be assigned (1) when the assigned working frequency is also used by a foreign station near enough to result in destructive electrical interference by simultaneous operation; or (2) if the channel occupancy of the assigned frequency, or frequencies, exceeds 40% during its specified busiest hours of operation. An application for assignment of an additional working frequency based on channel occupancy shall be accompanied by a record of monitorings, or other satisfactory information, to show that for any 4 days within a ten consecutive day period of station operation in each of two months immediately prior to the filing of the application, the assigned frequency, or frequencies, was in use for exchanging communications at least 40% of the 3 busiest hours of each day, of which not more than half of the use time may consist of waiting or set up time.

* * * * * * *

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Complaint by
HALL-TYNER ELECTION CAMPAIGN COMMITTEE
Concerning Equal Opportunities Under
Section 315 Re NBC–TV, New York,
N.Y.

OCTOBER 24, 1972.

MR. JOSE RISTORUCCI, *Campaign Manager, Hall-Tyner Election Campaign Committee, 175 Fifth Avenue, Room 910, New York City, N.Y. 10010*

DEAR MR. RISTORUCCI: This refers to your letter of September 26, 1972, concerning a complaint against NBC–TV, New York, New York, for violation of Section 315 of the Federal Communications Act and of the fairness doctrine. You state that on August 30, 1972, Senator George McGovern, Democratic Presidential candidate, appeared on the "Today Show"; that on September 5, 1972, you requested free and equal time for Mr. Gus Hall, Presidential candidate of the Communist Party U.S.A., to appear on that same show, based on Section 315 of Title 47, U.S. Code and the fairness doctrine; that you received a reply from NBC on September 15, 1972, denying your request on the grounds that the Today Show is not subject to the "equal opportunities" provisions of Section 315 and that "The Commission has also ruled that the fairness doctrine is issue-oriented and does not create a right in any particular individual or group to be granted time"; that on September 13, 1972, Dr. Benjamin Spock, Presidenial candidate of the People's Party appeared on the Today Show for 25 minutes; that this second appearance of a Presidential candidate would seem to indicate that the Today Show was planning a series of interviews with Presidential candidates; and that you again wrote to NBC–TV requesting equal time on the same basis as before and were refused. You further state that Mr. Hall is a legally qualified candidate for President, having been nominated by the 20th Convention of the Communist Party U.S.A.; that his candidacy along with that of Mr. Jarvis Tyner, his Vice-Presidential running mate, is certified to appear on the November 1972 ballot in more than 10 states and further certification is awaited in many other states; that the appearance so far of two Presidential candidates on the Today Show, plus substantial news coverage of the Nixon campaign, has meant that different viewpoints are being broadcast for consideration by the public, with the exclusion of the Communist viewpoint; and that the nomination of Mr. Hall and Mr. Tyner

by more than 300,000 registered voters nationally and the certification of the Communist Party for ballot status in more than 10 states should indicate a substantial interest among the public in hearing the Communist viewpoint. You request that free and equal time be given to Mr. Hall or a spokesman for the Communist viewpoint.

With regard to the "Today Show," the Commission has previously ruled that the appearance of a candidate on that program was exempt from the "equal opportunities" requirement of Section 315 of the Communications Act. In *Lar Daly*, 40 F.C.C. 314 (1960), at page 314, the Commission stated the following:

> Facts show that Today program has been regularly scheduled network program containing different features and emphasizing news coverage, news interviews, news documentaries and on-the-spot coverage of news events; that the determination of the content and format of Senator Symington interview and his participation therein was made by NBC in the exercise of its news judgment and not for the Senator's political advantage; that questions asked of Senator were determined by special projects director of program: and that Senator was selected by reason of his newsworthiness and NBC's desire to interview him concerning current problems, issues and events.

An appearance by a candidate on this type of program involves the "news judgment" of a licensee, and in its Letter to *American Broadcasting Co., Columbia Broadcasting System, Inc., and National Broadcasting Co., Inc.* 16 F.C.C. 2d 650 (1969), the Commission stated that "The general rule is that we do not sit to review the broadcaster's news judgment, the quality of his news and public affairs reporting, or his taste."

With respect to the fairness doctrine aspects of your complaint, I am enclosing the Commission's Public Notice of July 1, 1964, entitled "Applicability of the Fairness Doctrine in the Handling of Controversial Issues of Public Importance" which explains that under the fairness doctrine no particular individual is entitled to time for response, but rather it is the licensee's obligation to make available reasonable opportunity for presentation of contrasting views on controversial issues of public importance. The Commission will only review the licensee's judgment as to its reasonableness and good faith. The Public Notice also explains (third column of first page of printed text) the procedures which are to be followed in filing a fairness doctrine complaint including the basis for complainant's assertion that the licensee has not, in its overall programming, afforded reasonable opportunity for presenting of contrasting views. In a more recent Commission ruling (*Letter to Allen Phelps*, 21 F.C.C. 2d 12, 13 (1969)), the Commission stated that fairness doctrine complaints must "set forth reasonable grounds for concluding that the licensee in his overall programming has not attempted to present opposing views on the issue."

You appear not to have presented reasonable grounds for such a conclusion and thus, no further action appears warranted at this time. We note with respect to the fairness aspect of your complaint that NBC presented Mr. Hall for 15 minutes on an unpaid basis on August 28, 1972.

Staff action is taken here under delegated authority. Application for review by the full Commission may be requested within 30 days by writing the Secretary, Federal Communications Commission, Washington, D.C. 20554, stating the factors warranting consideration. Copies must be sent to the parties to the complaint. See Code of Federal Regulations, Volume 47, Section 1.115.

Sincerely yours,

WILLIAM B. RAY, *Chief,*
Complaints and Compliance Division
for Chief, Broadcast Bureau.

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Complaint by
WILLIAM E. BARTLEY, Jr.
Concerning Equal Time Under Section 315 Re Station WHAS–TV, Louisville, Ky.

OCTOBER 27, 1972.

STUART L. LYON, ESQ., *Kaplan, Lyon, Brady & Samuel, 310 West Liberty, Louisville, Ky.*

DEAR MR. LYON: This refers to your letter of October 4, 1972 concerning a complaint and request for equal time on behalf of Mr. William E. Bartley, Jr., against WHAS–TV, Louisville, Kentucky. You state that Mr. Bartley is the duly nominated candidate of the Kentucky People's Party for the position of United States Senator; that WHAS–TV has invited the majority of the Democratic and Republican candidates who are running for statewide office in Kentucky and congressional districts surrounding Louisville, including the Democratic and Republican candidates for the U.S. Senate, to appear on a WHAS–TV interview or talk show; and that WHAS–TV has stated that Mr. Bartley's presence on the program is unwelcome. You further state that Mr. Bartley will be denied equal time by the conduct of WHAS–TV in not allowing him to participate in said program; that Mr. Bartley insists that WHAS–TV is acting illegally, improperly and in violation of the equal time provision laws as well as their intent as adopted by the Congress of the United States; that the Commission should use its influence to compel WHAS to invite Mr. Bartley to appear on the program "News Conference"; that the Commission should grant him immediate relief because he is suffering irreparable injury; and that WHAS–TV should be censured for its conduct and be informed that future conduct of this nature could well result in revocation of its license.

A member of the Commission's staff contacted WHAS–TV and was advised that the program "WHAS News Conference" is a regularly scheduled news interview show that has been broadcast for several years on Sunday evenings between 7:00 and 7:30 p.m.; that guests are selected on the basis of the licensee's judgment of "newsworthiness" and have no control over questions asked by the panel of interviewers; and that the Democratic and Republican candidates for U.S. Senate are scheduled to appear on the program, but that each will appear individually on separate programs. The station further stated that coverage of Mr. Bartley's campaign has been provided in its news programming.

Enclosed for your information are copies of the Commission's Public Notices of August 7, 1970 and March 16, 1972, entitled "Use of Broadcast Facilities by Candidates for Public Office." These documents contain the provisions of Section 315 of the Communications Act, the amendments enacted by the Congress, the Commission's rules and regulations promulgated thereunder, and representative rulings and interpretations. Section III C. of the 1970 Public Notice discusses what constitutes appearances exempt from the "equal opportunities" provisions of Section 315. See Questions and Answers 6–14 in particular.

In view of the above and in the absence of information to the contrary regarding the licensee's description of the programs, it appears that "WHAS News Conference" is a "bona fide news interview" program under Section 315(a)(2) of the Communications Act of 1934 and thus exempt from the "equal opportunities" provisions of the statute.

Staff action is taken here under delegated authority. Application for review by the full Commission may be requested within 30 days by writing the Secretary, Federal Communications Commission, Washington, D.C. 20554, stating the factors warranting consideration. Copies must be sent to the parties to the complaint. See Code of Federal Regulations, Volume 47, Section 1.115.

Sincerely yours,

WILLIAM B. RAY, *Chief,*
Complaints and Compliance Division
for Chief, Broadcast Bureau.

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Complaint by
KILSOO HAAN, APTOS, CALIF.
Concerning Equal Opportunities Under
Section 315 Re Station KGO

OCTOBER 19, 1972.

MR. KILSOO HAAN, *P.O. Box 663, Aptos, Calif.*

DEAR MR. HAAN: This is in reply to your letter inquiring whether you had the legal right to ask for equal time from radio station KGO in San Francisco, California, in order "to defend U.S. wartime policy in regard to the removal of Japanese from the Pacific Coast Military Zones to inland areas."

In your letter you allege that on January 10, 1972, from 1:00 p.m. to 3:00 p.m., the licensee broadcast a program on which Mr. Owen Spann of KGO discussed with Dr. Conrad and Japanese American Citizen League representative Dr. Uno the subject of Executive Order 9066 and the removal of the Japanese to inland areas; that this discussion omitted relevant historical facts; that this omission of facts resulted in a "whitewash" of the Japanese activities against America in World War II; that you requested "equal time" from KGO to respond to the issues raised in the programs; and that the licensee denied your equal time request.

In response to your complaint, the American Broadcasting Companies, Inc., licensee of radio station KGO, allege that (Mr.) Richard Conrad and (Mr.) Edison Uno discussed their book entitled "*Executive Order 9006*" on a "call-in" program; that the two authors expressed the view that the order of the President which caused the relocation of Japanese-Americans during World War II was unwarranted and unconstitutional; and that several persons called in and expressed views supporting the wartime relocation. ABC further alleges that a discussion of a book on an Executive Order promulgated 30 years ago is not currently a controversial issue of public importance, particularly in light of the fact that Congress repealed legislation which at one time provided for mass detention; and that, even if the discussion were of a controversial issue of public importance, contrasting views were expressed via those people who called in on the talk show and presented views supporting governmental action in World War II.

A station which presents one side of a controversial issue of public importance is required to afford reasonable opportunity for the presentation of contrasting views. This policy, known as the fairness doctrine, does not require that "equal time" be afforded for each side, as

would be the case if a political candidate appeared on the air during his campaign. Instead, the broadcast licensee has an affirmative duty to encourage and implement the broadcast of contrasting views in its overall programming which, of course, includes statements or actions reported on news programs. Thus, both sides need not be given in a single broadcast or series of broadcasts, and no particular person or group is entitled to appear on the station, since it is the right of the public to be informed which the fairness doctrine is designed to assure, rather than the right of any individual to broadcast his views. It is the responsibility of the broadcast licensee to determine whether a controversial issue of public importance has been presented and, if so, how best to present contrasting views on the issue. The Commission will review complaints to determine whether the licensee can be said to have acted reasonably and in good faith.

On the basis of the information before the Commission it does not appear that the actions of the licensee were unreasonable. There is no indication that the wartime relocation of Japanese-Americans constitutes a controversial issue of public importance today. We also note that the licensee's action in inviting callers to express views opposed to that of Mr. Conrad and Mr. Uno appears to have been reasonable and in good faith. The Commission feels that no further action is warranted at this time.

Staff action is taken here under delegated authority. Application for review by the full Commission may be requested within 30 days by writing the Secretary, Federal Communications Commission, Washington, D.C. 20554, stating the factors warranting consideration. Copies must be sent to the parties to the complaint. See Code of Federal Regulations, Volume 47, Section 1.115.

Sincerely yours,

WILLIAM B. RAY, *Chief,*
Complaints and Compliance Division
for Chief, Broadcast Bureau.

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Complaint by
NATIONAL LIBERTARIAN PARTY, WESTMINSTER, COLO.
Concerning Equal Opportunities Under Section 315 Re ABC–TV

OCTOBER 31, 1972.

MR. PATRICK H. LOWRIE, JR., *Executive Committee, National Libertarian Party, 7748 Lowell Boulevard, Westminster, Colo.*

DEAR MR. LOWRIE: This refers to your letter of October 12, 1972, concerning the "Issues and Answers" program on minority political parties broadcast by ABC–TV on Sunday, October 8, 1972. You state that the parties represented on the program were the Communist Party, the Peoples' Party, the Socialist Labor Party, and the Socialist Worker's Party; that the impression was given that these parties were representative of the minority parties as a whole, but that the program represented only those parties on the extreme left; that while the Libertarian Party was contacted by ABC–TV prior to the broadcast requesting information on the Party for use in such program, the network, subsequent to the broadcast, stated that "they have no intention of allowing the Libertarian Party equal time to present its views"; that the Libertarian Party has over 2500 active members, representing over 45 of the 50 states; that Dr. John Hospers and Mrs. Tonie Nathan, the Libertarian Party Presidential and Vice-Presidential candidates, will be on the ballot in at least two states; and that the Libertarian Party will have candidates running for state office in several states. You further state that the Libertarian Party is not a socialist or socialist leaning party and that ABC–TV, by treating its program on minority parties as it did, created the impression that all minority parties are socialist in principle. You request that "in accordance with the equal time provision for political statements by responsible political entities" the Commission require ABC–TV to allow the Libertarian Party fifteen minutes of television time at a time of day approximating the same viewer concentration as that of "Issues and Answers."

Correspondence from other Libertarian Party members making similar requests indicates that the October 8th broadcast of "Issues and Answers" was a special one-hour edition; that the minority parties that appeared on the program were allocated approximately 15 minutes each to air their views through their presidential candidates; that the Libertarian Party is pro-capitalist; and that the network stated that the anti-socialist, pro-capitalist viewpoint had been given enough time since John Schmitz, Presidential candidate of the American In-

dependent Party, had been presented on the program for an hour the previous week.

Enclosed for your information are copies of the Commission's Public Notices of August 7, 1970, and March 16, 1972, entitled "Use of Broadcast Facilities by Candidates for Public Office." These documents contain the provisions of Section 315 of the Communications Act, the amendments enacted by the Congress, the Commission's rules and regulations promulgated thereunder and representative rulings and interpretations. This material should serve to inform you, generally, as to the applicability of Section 315 in given situations.

The Commission has previously ruled that the program "Issues and Answers" is a bona fide news interview program of the type which Congress intended to be exempt from the "equal opportunities" provisions of Section 315. See *Telegram to Yates for U.S. Senator Committee*, 40 F.C.C. 368 (1962) and Q. and A. 12, Section III. C. of the enclosed Public Notice of 1970.

Also enclosed for your information is a copy of the Commission's *First Report—Handling of Political Broadcast; The Handling of Public Issues Under the Fairness Doctrine and the Public Interest Standards of the Communications Act*, 36 F.C.C. 2d 40 (1972). In Section IV, Paragraph 32, page 50 of the *First Report*, the Commission stated the following:

> It follows that *Zapple* did not establish that in the political broadcast field there is now a quasi-equal opportunities approach applicable to all candidates and parties, including those of a fringe nature. This would clearly undermine any future suspension or repeal of the "equal opportunities" requirement, because it would mean that despite such suspension or repeal, the fairness doctrine would require that fringe party candidates be given comparable treatment with major party candidates. Further, it would negate the 1959 Amendments to the Communications Act. The purpose of these amendments was to permit presentation of candidates on, for example, a bona fide newscast, news interview, or news documentary, without the station having to present the fringe candidates. We need not belabor the point further. The *Zapple* ruling did not overrule the holding in *Letter to Lawrence M. C. Smith*, 25 Pike & Fischer, R.R. 291 (1963).

In *Letter to Lawrence M. C. Smith*, 40 F.C.C. 549 (1963), the Commission held that as to fund raising announcements for political parties, fairness does not require equal or comparable treatment for the fringe parties but rather that the licensee can make reasonable good faith judgments as to the significance of a particular party in the area. Thus, in regard to the presentation of particular points of view of minority parties, the licensee would be called upon to make a good faith judgment as to whether, and, if so, how much time should be devoted to minority parties.

In view of the above, it does not appear that ABC–TV, has acted unreasonably in denying your request for "equal" or "quasi-equal" opportunities. Further Commission action does not appear warranted at the present time.

Staff action is taken here under delegated authority. Application for review by the full Commission may be requested within 30 days by writing the Secretary, Federal Communications Commission, Washington, D.C. 20554, stating the factors warranting consideration. Copies must be sent to the parties to the complaint. See Code of Federal Regulations, Volume 47, Section 1.115.

Sincerely yours,

WILLIAM B. RAY, *Chief,*
Complaints and Compliance Division,
for Chief, Broadcast Bureau.

169 015- 72----8

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Request by
REV. DONALD L. LANIER BROADWAY CHRISTIAN CHURCH, COLUMBIA, MO.
For Ruling Concerning Equal Opportunity Exemption in Section 315(a)(1)

OCTOBER 27, 1972.

REV. DONALD L. LANIER,
Broadway Christian Church,
2601 West Broadway,
Columbia, Mo.

This refers to your request for ruling as to whether interviews on your religious news program "The Church Today" with two ministers who are candidates for public office would fall within the "equal opportunity" exemption in Section 315(a)(1) of the Communications Act of 1934, as amended. You state that you plan to interview the two ministers for a total of approximately six minutes, that your program deals with current religious news in your area, that you intend to ask the ministers, inter alia, why they, as ministers, decided to enter politics and that you have interviewed other persons in your weekly program, which is broadcast by stations KFRU–AM, Columbia, KDKD, Clinton, and KWOS–AM, Jefferson City, Missouri. On the basis of the information furnished to the Commission, "The Church Today" program appears to deal with current news regarding events in the field of religion and to fall within the category of a "bona fide newscast." Accordingly, appearances of the two ministers on the program appear to be exempt from the equal opportunities requirement of Section 315 of the Act. Action taken here is under delegated authority. Application for review by the full Commission may be requested within 30 days by writing the Secretary, Federal Communications Commission, Washington, D.C. 20554, stating the factors warranting consideration. Copies must be sent to the parties to the complaint. See Code of Federal Regulations, Volume 47, Section 1.115.

FEDERAL COMMUNICATIONS COMMISSION,
WILLIAM B. RAY, *Chief,*
Complaints and Compliance Division,
Broadcast Bureau.

F.C.C. 72R-308

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Application of UNITED COMMUNITY ENTERPRISES, INC., GREENWOOD, S.C. For Construction Permit	Docket No. 18503 File No. BP-17439

APPEARANCES

Lawrence J. Bernard, Jr., on behalf of United Community Enterprises, Inc.; and *Philip V. Permut*, on behalf of the Chief, Broadcast Bureau, Federal Communications Commission.

DECISION

(Adopted October 25, 1972; Released November 1, 1972)

BY THE REVIEW BOARD: BERKEMEYER, NELSON AND PINCOCK.

1. This proceeding involves the application of United Community Enterprises, Inc. (United) for a construction permit for a new standard broadcast facility to operate on 1090 kHz, 1 kw, daytime only, at Greenwood, South Carolina. By Memorandum Opinion and Order published April 5, 1969, 34 FR 6211, 16 FCC 2d 1065, the Commission designated the mutually exclusive applications of United and Saluda Broadcasting Company, Inc. (Saluda) for hearing, specifying, *inter alia*, financial, *Suburban* and Rule 73.35(a) issues against United. On December 10, 1969, Saluda filed a petition with the Administrative Law Judge requesting dismissal of its application. The petition was granted by the Presiding Judge in a Memorandum Opinion and Order, released March 2, 1970 (FCC 70M-294). This action effectively mooted all but the aforementioned issues. In an Initial Decision, FCC 71D-72, released October 19, 1971, Administrative Law Judge Jay A. Kyle proposed denial of the application under the Rule 73.35 issue. Exceptions, a supporting brief and a request for oral argument were filed by United on December 20, 1971.[1] A reply to exceptions was filed by the Broadcast Bureau on January 4, 1972. Oral argument was heard by a panel of the Review Board on June 8, 1972. The Board has reviewed

[1] On November 4, 1971, after release of the Initial Decision, United filed a motion for clarification and/or for modification of issues with the Review Board. Also before the Board are the Broadcast Bureau's comments, filed November 17, 1971, and a reply, filed November 26, 1971, by United. The Board, by Order, FCC 71R-346, released November 30, 1971, stated that it would be preferable for the parties to argue the merits of the questions involved in the motion before the Board either in their exceptions and briefs or at oral argument on the exceptions and granted a request for extension of time in which to file exceptions to the Initial Decision. These pleadings, except to the extent that relevant arguments are incorporated by reference in United's brief in support of exceptions and the Bureau's reply to exceptions, are rendered moot by the instant Decision.

the Initial Decision in light of the exceptions and briefs, the arguments of the parties, and its examination of the record herein. Except for the Rule 73.35(a) issue, the Board agrees with the Administrative Law Judge's findings and conclusions, which are hereby adopted. However, for the reasons hereafter stated, the Board does not agree with the Judge's resolution of that issue and therefore with his ultimate conclusion to deny United's application.

2. The facts relevant to the Rule 73.35(a) issue are not complex. John Y. Davenport, 50% stockholder of United, is vice-president and secretary of Broadcasting Company of the Carolinas, Inc. (BCC), the licensee of standard broadcast Station WESC at Greenville, South Carolina. He is also general manager of Station WESC. Wallace A. Mullinax, the other 50% owner of United, is station manager and sales manager of WESC. Neither has any ownership interest in BCC nor is either a director, and both intend to remain in jobs at the Greenville station after their proposed station in Greenwood commences operation. Station WESC operates with a non-directional antenna, except for specified periods when it operates with a directional antenna. When overlap (between its 1 mv/m contour and that proposed by United) occurs during morning hours, duration of the periods varies from 15 minutes in September to 75 minutes in June. In the evening, the overlap occurs for a period of 60 minutes. The starting time of the periods of overlap varies in the mornings from 6:00 A.M. in April to 7:45 A.M. in June and in the evenings from 4:15 P.M. in December to 7:45 P.M. in June and July.[2] The transmitter sites are 52 miles apart. When WESC operates non-directional, there is no prohibited overlap whatsoever since there is a clearance of one mile between the 1 mv/m contour of WESC and that of the proposed station. When WESC operates with a directional antenna during the limited specified periods, the WESC 1 mv/m contour overlaps United's proposed 1 mv/m contour by a distance of 5.5 miles, encompassing an area of 51 square miles and a population of 1,791 persons. From eight to ten 0.5 mv/m services are available within the overlap area.

3. The Presiding Judge concluded that an overlap situation exists, and that, in light of the Commission's letter in *Anadarko Broadcasting Co.*, 22 FCC 2d 573, 19 RR 2d 223 (1970), Mullinax and Davenport hold positions at WESC which fall within the purview of Section 73.35(a).[3] The Presiding Judge further concluded that in the absence of a waiver issue he has no authority to make a determination as to whether a waiver of Rule 73.35(a) would be appropriate or to grant such a waiver.[4] Therefore, he concluded, "since the proposal here contravenes Section 73.35(a), the grant cannot be made for that reason alone." In its exceptions and brief in support of exceptions, United ar-

[2] The Review Board has taken official notice of this information, which is on public file with the Commission.

[3] "73.35 Multiple Ownership

No license for a standard broadcast station will be granted to any party . . . if: (a) Such party directly or indirectly owns, operates, or controls: one or more standard broadcast stations and the grant of such license will result in any overlap of the predicted or measured 1 mv/m groundwave contours of the existing and proposed stations. . . ."

[4] The Presiding Judge did note, however, that when the State of South Carolina created planning districts for the purpose of fostering area-wide economic development plans it placed Greenwood and Greenville in separate planning districts.

gues that Rule 73.35(a) does not apply to the circumstances in this case and excepts to the Presiding Judge's failure to conclude that neither of United's principals owns or operates WESC and that the distinct, derivative cross interest policy is applicable in these circumstances. The applicant also excepts to the Presiding Judge's failure to consider evidence going to the public interest consideration of the policy [5] and to conclude on the basis of that evidence that the stations are not in the same radio market and that a grant in these circumstances would not contravene the cross interest policy.[6] United also submits that if Rule 73.35(a) is deemed to apply to the facts of this record, a waiver issue should be added. In its reply to exceptions, the Broadcast Bureau contends that officers and managers do "operate and control" a station and, thus, the proposal in this case contravenes Rule 73.35(a). Relying on Note #1 to Rule 73.35(a)[7] and *Anadarko, supra*, the Bureau maintains that the word "control" is not used only in its "legal" sense, but includes employees such as United's principals. In the absence of a waiver issue, concludes the Bureau, the extent of violation or the relationship between the communities is irrelevant and the Presiding Judge was correct in disregarding such evidence.

4. The Commission's multiple ownership rules with respect to each broadcast service (AM, FM and TV) are divided into two main parts. The *first* is the so-called "duopoly" or "overlap" part which provides limitations on the common ownership or control of broadcast stations in the same broadcast service where signals of the stations overlap. The *second* is the "concentration of control" or "seven station" part which limits the number of broadcast interests a party may hold, and which proscribes any grant which would result in a concentration of control of broadcast facilities in a manner inconsistent with the public interest. *Amendment of Multiple Ownership Rules*, 22 FCC 2d 696 (1968). We are concerned with the "duopoly-overlap" part because it is under this portion of the rule that the Commission promulgated its supplemental "cross interest policy", a principle which was not contained within the language of the rule but which the Commission enunciated as supplemental policy for the purpose of carrying out the objectives of the rule. In view of the fact that the Bureau, in its pleadings and during its presentation at the oral argument, failed to distinguish properly between the rule and the policy and failed to recognize the differences in the situations to which each is applied, it is pertinent that the evolution of both the rule and the policy be explored.

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[5] United introduced evidence which allegedly shows that the designated communities are separate markets and have no socio-economic ties. Specifically, United alleges that the highway distance between the two cities is 53 miles, the cities are in different, non-contiguous counties; letters from the Executive Vice-President of the Greater Greenville Chamber of Commerce, the Director of Fiscal Affairs of the Greenwood County Council and the Executive Director of the Greenville County Planning Commission express the opinion that "there is not a strong community of interest" between the cities and that in "several years . . . there has not been joint consideration of any political or economic matter." United also urges that the evidence accepted by the Presiding Judge showed that any overlap was insubstantial in area, extent of time, and amount of population to be affected.

[6] United states that the designation Order gave it notice of this question, that it introduced evidence to meet a cross interest question and that it does not desire to reopen the record or introduce more evidence. At oral argument, United expressly waived any claim to further hearings.

[7] "Note 1: The word 'control' as used herein is not limited to majority stock ownership, but includes actual working control in whatever manner exercised."

5. By Order No. 84A, dated November 23, 1943, 8 FR 16065, the Commission adopted the first part of its multiple ownership rule for AM stations (3.35) reading as follows:

> **No license shall be granted for a broadcast station, directly or indirectly owned, operated or controlled by any person where such station renders or will render primary service to a substantial portion of the primary service area of another standard broadcast station, directly or indirectly owned, operated or controlled by such person, except upon a showing that public interest, convenience and necessity will be served through such multiple ownership.**

The following footnotes accompanied the rule:

> (a) The word 'control', as used herein, is not limited to majority stock ownership but includes actual working control in whatever manner exercised.
>
> (b) The word 'person', as used herein, includes all persons under common control.

It is clear from the precedents (hereinafter set forth) that the inclusion of the words "operated and controlled" were intended by the Commission to apply to situations where such operation or control could be equated with *ownership*. Those words were not intended to include minority stock interests, directorships, corporate officers or persons in managerial positions.

6. In August 1948, 13 FR 5060, the Commission initiated proposed rule making to amend Section 3.35. Of pertinent interest to us at this time is the fact that the Commission proposed, in substance, to adopt a three-part rule. The first part was an expanded restatement of its 1943 "duopoly-overlap" rule. The second part was intended to add minority interest to its "duopoly-overlap" portion in these terms:

> **(2) Such person or any stockholder, officer or director of such person directly or indirectly owns any interest in, or is an officer or director of, another broadcast station located in the same community or in another community in the same metropolitan district.**

The third part proposed, for the first time, to adopt a "concentration-seven station" rule with introductory language similar to that which exists today.

7. In its Report and Order of November 25, 1953, 18 FR 7796, 18 FCC 288, 9 RR 1563, the Commission adopted, with revisions, the first and third portions of its proposed amendments of August 1948, but did *not adopt the proposed second portion relating to minority interests* in duopoly-overlap situations. In paragraph 8 of its Report, the Commission stated: ". . . We have determined not to effectuate, at this time, any change with respect to overlap. . . . Accordingly, we take no action here changing the present provisions of our rules governing overlap situations." In short, the Commission retained its "duopoly-overlap" rule limited to *ownership* of stations in the same area and adopted its concentration of control-seven station rule which included stockholders, officers and directors.

8. Returning for the moment to the adoption in 1943 of the "duopoly-overlap" rule, shortly thereafter the Commission had occasion to pass on situations where a party not proposing to "own, operate or control" two stations in the same community did propose to have an

"interest" in two stations in the same community or serving substantially the same area. Further, situations were presented where a party who owned a station proposed to acquire an interest in another station in the same community or area through the acquisition of a minority stock or by becoming an officer, director or manager. Clearly, the wording of the "duopoly-overlap" rule itself did not prohibit such acquisitions or the holding of offices. Nevertheless, in the interest of insuring arm's-length competition among broadcasters and diversity of effects on public opinion, the Commission concluded that, as a matter of policy, it would be contrary to the public interest to permit such acquisitions or office holdings. Thus evolved the Commission's "cross interest" policy, a policy which went outside the wording and application of the "duopoly-overlap" *rule* and which proclaimed its unwillingness to permit any degree of "cross interest", direct or indirect, in two or more stations in the same broadcast service serving substantially the same area. *Minnesota Broadcasting Corp.*, 13 FCC 672, 4 RR 1376 (1949); *Shenandoah Life Insurance Co.*, 19 RR 1 (1959).

9. In light of the above, when duopoly-overlap situations were presented to the Commission, it became necessary to make a threshold determination as to whether the rule or the policy should be invoked. The determining factor was the degree of interest in the stations involved. If a party's interest in both stations constituted ownership, or any operation or control which could be equated with ownership, the rule applied. See *Naugatuck Valley Service, Inc.*, FCC 64–631, 2 RR 2d 1005, decided *sub nom. Quinnipiac Valley Service, Inc.*, 27 FCC 2d 66, 20 RR 2d 1081 (1971); *Caldwell Broadcast Co., Inc.*, 1 FCC 2d 653, 6 RR 2d 158 (1965); *Dover Broadcasting Co., Inc.*, 5 RR 2d 440 (1965); *North Caddo Broadcasting Co.*, 3 RR 2d 342 (1964): *Liberty Television*, 26 FCC 2d 760, 20 RR 2d 995 (1970), and 28 FCC 2d 50, 21 RR 2d 488 (1971); *North Shore Broadcasting Corp.*, 8 FCC 2d 741, 10 RR 2d 560 (1967); *Tidewater Broadcasting Co., Inc.*, 2 FCC 2d 364, 6 RR 2d 730 (1966); and *Des Moines County Broadcasting Co.*, 37 FCC 638, 3 RR 2d 416 (1964). If, however, the interest in either station was of lesser degree, such as a minority stock ownership or the position of officer, director or manager, the "cross interest" policy applied. See *WTAR Radio-TV Corp.*, 31 FCC 2d 812, 19 RR 2d 661 (1970), reconsideration denied FCC 70–1251, December 7, 1970; *Martin Lake Broadcasting Co.*, 21 FCC 2d 180, 18 RR 2d 245 (1970); *K & M Broadcasters, Inc.*, 19 FCC 2d 947, 17 RR 2d 543 (1969); *Media, Inc.*, 20 FCC 2d 937 (1969); *KFRM, Inc.*, 5 FCC 2d 348, 8 RR 2d 903 (1966); *Carolina Broadcasting Service*, 25 RR 515 (1963); *Shenandoah Life Insurance Co, supra.*

10. The Commission paralleled its case law in the various rule making proceedings it initiated to amend its multiple ownership rules, recognizing and continuing to distinguish between situations where the rule applied and the situations which did not come within the proscriptions of the *rule* but did require consideration under its *policy*. Thus, in its Notice of September 18, 1964, FCC 64–861, 29 FR 13211 (par. 3), the Commission referred to "our duopoly policy which flows

from the multiple ownership rules." Further, in paragraph 6 of the above Notice, it was stated:

> The Commission has consistently applied the duopoly *policy* through the years to prevent ownership of an interest in more than one station in the same band in the same city. *Minnesota Broadcasting Corp., supra; Atlanta Newspapers, Inc.*, 7 RR 482 (1951). The Commission has also applied the *policy* to prevent an interlocking directorate involving two corporations each with a station in the same service in the same city (*Shenandoah Life Insurance Co.*, 19 RR 1). As with the one percent rule, the Commission believes that the present duopoly *policy* is an appropriate standard. (Italics added.)

The above Notice (FCC 64–861) dealt with the minority broadcast interests of trusts, bank nominees, brokerage houses and mutual funds. In its *Report and Order* of June 12, 1968, 13 FCC 2d 357, 13 RR 2d 1601, under the heading "The Duopoly Policy", the Commission continued its distinction between the rule and the policy.

11. Judicial recognition and affirmation of the *ownership* aspects of the multiple ownership rule and, therefore, of the *minority interest* aspects of the "cross interest" policy, came on July 9, 1968, less than a month after the issuance of the above Report and Order of June 12, 1968. *Radio Athens, Inc.* v. *FCC*, 130 U.S. App. D.C. 333, 401 F. 2d 398, 13 RR 2d 2094. In that case, Radio Athens, licensee of AM Station WATH, filed an application to increase power. A 70-percent stockholder of Radio Athens was, additionally, an officer and director thereof, and also owned 32.5% of the stock of the licensee of a neighboring AM station and was an officer and director of the licensee. A grant of the application would have resulted in the type of overlap of contours proscribed by the duopoly *rule*. The Commission had refused to accept the application for filing, but the Court reversed and ordered the Commission to designate the application for hearing. It follows from the Court's holding requiring proof of control that if no ownership or control of both the stations were involved, the rule could not be invoked.[8]

12. In multiple ownership rule-making proceedings subsequent to *Radio Athens*, the Commission gave full recognition to the holding there and clearly and unequivocally indicated that its duopoly *rule* was limited to *ownership* of broadcast stations and did not include interests such as are involved in the application of its "cross interest" *policy*. Thus, in its *First Report and Order* of March 25, 1970, FCC 70–310, 22 FCC 2d 306, 18 RR 2d 1735 (dealing with a proposal which was "in essence an extension of the present duopoly rules, since it would proscribe common ownership, operation, or control of more than one unlimited-time broadcast station in the same area, regardless of the type of broadcast service involved"), the Commission stated, under the heading "Minority cross-interests", as follows:

> 72. ABC, Auburn, and GEBCO state that since the notice did not mention minority cross-interests, they assume that the present proceeding is not directed at broadening the duopoly rules to embrace such interests, and that if the Commission decides to take such a step they will be given an opportunity to comment pursuant to provisions of the Administrative Procedure Act. *We agree*

[8] The Commission granted the application of Radio Athens on July 1, 1970. 23 FCC 2d 968.

that the notice did not refer to minority cross-interests, and the rules we adopt today contain no new language thereon. Inasmuch as the new rules are an extension of the present duopoly rules, we are announcing that the rulings that we have made in the past on minority cross-interests in duopoly cases will be carried over and applied to cases involving such interests under the new rules. However, of course, situations under the new rules that are like that which arose in *Radio Athens*, in which an application was dismissed as not acceptable for filing, will be treated consistently with the holding of that case. (Italics added.)

73. The subject of minority cross-interests, involving, for example, less than complete cross-ownership, interlocking directorates, partial ownership in one station and employment by another, and other matters, is in need of re-examination and we intend to give it consideration which may lead to actions looking toward the issuance of interpretative or other regulations.

13. At the same time the Commission adopted the above *Report and Order* (FCC 70–310), it issued a *Further Notice of Proposed Rule Making*, FCC 70–311, 22 FCC 2d 339, proposing divestiture of broadcast and newspaper ownership. In paragraph 49 of said Further Notice, the Commission referred to said Report and Order and stated:

In the rules adopted today, we discussed the subject of minority cross-ownership interests (first report and order, pars. 69–73). We see no reason why the approach mentioned there should not be carried over into the rules proposed herein. . . .

Finally, in its Memorandum Opinion and Order of March 2, 1971, FCC 71–211, 28 FCC 2d 662, 21 RR 2d 1551, the Commission passed on petitions for reconsideration of its First Report and Order of March 25, 1970 (FCC 70–310) and reiterated its holding that minority broadcast interests were not contemplated in applying the "duopoly-overlap" *rule*. (Pars. 29 and 30.) Thus, it is clear that since the adoption of the "duopoly-overlap" rule in 1943, the Commission, in rule making proceedings and case decisions, has invoked that rule only in situations involving *ownership* of broadcast stations or the equivalent; that in cases of lesser interests, the rule did not apply and the Commission considered such situations under its "cross interest" *policy;* that such minority interests include stock interests of less than 50%, management officials, and corporate officers and directors; and that the Courts have recognized these distinctions.

14. The *Anadarko* letter relied upon by the Presiding Judge and the Broadcast Bureau did not destroy the distinction carefully preserved in the line of Commission proceedings and decisions cited above. In light of the history and precedents, it is clear that the "Commission's construction of the rule" and "policy considerations" in that letter refer to the cross interest policy promulgated under the rule.[9]

15. The Commission has also made a clear distinction in how the Rule and policy are to be applied. With regard to the rule, the Commission has established a strict test (*1964 Multiple Ownership Rules*, FCC 64–445, 29 FR 7535, 2 RR 2d 1588), stating that the previous *ad hoc* approach was demonstratively an inefficient and ineffective

[9] The language in *William F. Huffman Radio, Inc.*, 13 FCC 2d 922, 14 RR 2d 96 (1967), cited by the Bureau at oral argument, similarly encompasses the cross interest policy. *Voice of Dixie, Inc.* (*WVOK*), 10 FCC 2d 903, 11 RR 2d 1060 (1967), also cited by the Bureau, in fact demonstrates the distinction between the rule and policy. An application, dismissed under the rule when the interests of a husband and wife totalled 50% of the stock of a licensee, was reinstated after their divorce so that the resultant minority cross interests could be investigated.

means to achieve the rule's goals. Flexibility is possible by a waiver provision (see footnote 12 of the *1964 Multiple Ownership Rules*, *supra*, and FCC 64–904, 29 FR 13896, 3 RR 2d 1554), but once ownership and overlap have been established, the Rule has been applied strictly and waiver granted sparingly. See *Quinnipiac Valley Service, Inc.*, *supra; Caldwell Broadcast Co., Inc.*, *supra; Dover Broadcasting Co., Inc.*, *supra;* and *North Caddo Broadcasting Co.*, *supra. Cf. Liberty Television*, *supra; North Shore Broadcasting Corp.*, *supra; Tidewater Broadcasting Co., Inc.*, *supra.* Compare *Des Moines County Broadcasting Co.*, *supra*, decided prior to the revision of Rule 73.35(a). In applying the cross interest policy, on the other hand, the cases demonstrate that overlap of contours raises public interest questions which must then be resolved in an evidentiary hearing.[10] In such circumstances, the Commission will determine whether individuals connected with one facility also have "some meaningful relationship" with the other facility and, if so, whether those facilities "serve substantially the same area." *WTAR Radio-TV Corp.*, *supra; Martin Lake Broadcasting Co.*, *supra; K & M Broadcasters, Inc.*, *supra; Golden West Broadcasters*, 16 FCC 2d 918, 15 RR 2d 938 (1969); *Media, Inc.*, *supra;* and *KFRM, Inc.*, *supra.* By its nature, such a determination is made on an *ad hoc* basis and the Commission and the Board have consistently done so. Thus, under the principles set forth above, it is our duty to consider the evidence and arguments advanced by the applicant herein to determine whether, under said policy, and its purposes, the instant application should be granted.

16. As previously indicated, the criteria for determining whether there will be an adverse effect on the public interest, *i.e.*, arm's-length competition and diversity of viewpoints, encompass determinations as to whether the individuals involved have some "meaningful relationship" with both stations and, if so, whether those facilities serve "substantially the same area." Although the positions of general manager, station manager and sales manager constitute "meaningful relationships" with the existing station and thus come within the cross interest policy, it is clear that the proposed station will not serve "substantially the same area" as WESC. The Commission has expressly determined that stations served the same area where they were in the same or adjacent cities (*Golden West Broadcasters*, *supra*), were only 21 miles apart (*Carolina Broadcasting Service*, *supra*), and where stations 100 miles apart overlapped an area of 900 square miles containing an urbanized area with a substantial population (*Anadarko Broadcasting Co.*, *supra*). Where the Commission considered the designated cities to be in different radio markets, it declined to specify a cross interest issue (*KFRM, Inc.*, *supra*). In the instant case, the overlap area is 5.5 miles at its greatest extent and contains an area of 51 square miles with a population of 1,791 persons. Significantly, the overlap occurs only during a short transitional period of time each day,

[10] The Board notes that, in contrast to its present position, the Bureau, in *Martin Lake Broadcasting Co.*, 22 FCC 2d 678, 18 RR 2d 1084 (1970), petitioned to have "the implications flowing from such relationships . . . thoroughly explored in the evidentiary hearing process." The pleading in *Martin Lake* was filed two months before *Anadarko* was released and it would seem that except for that letter the Bureau would have no objection to the application of the cross interest policy, as distinguished from Rule 73.35(a), to the facts of record.

that period varying with times of sunrise and sunset.[11] Thus, in terms of area, population, and time, the overlap must be characterized as minimal, and therefore it cannot be concluded that the stations will serve substantially the same area. In view of the nature of the overlap, it is inconceivable that the cross interest here will permit United's principals to exercise an inordinate effect on public opinion. Along with the above facts, United presented evidence, which was not contradicted, showing that the towns of Greenwood and Greenville are separate political and economic entities. (See footnotes 3 and 5.) Basing its determination on the Bureau of the Budget's listing of Standard Metropolitan Statistical Areas (Circular A–46), the Commission also regards the two towns as being in distinct radio markets. These facts, considered in light of the minimal nature of the overlap, inescapably lead to the conclusion that grant of the application could not subvert the Commission's policy of fostering open, arm's-length competition between the two stations. In view of the foregoing, we further conclude that a grant of United's application will not contravene the Commission's cross interest policy and would therefore serve the public interest, convenience and necessity.

17. Accordingly, IT IS ORDERED, That the motion for clarification and/or modification, filed on November 4, 1971, by United Community Enterprises, Inc. IS DISMISSED; and that the application of United Community Enterprises, Inc., for a construction permit for a standard radio broadcast station at Greenwood, South Carolina, IS GRANTED.

FEDERAL COMMUNICATIONS COMMISSION,
JOSEPH N. NELSON,
Member, Review Board.

APPENDIX

RULINGS ON EXCEPTIONS OF UNITED COMMUNITY ENTERPRISES, INC.

Exception No.	*Ruling*
1, 4	*Denied.* As pointed out by the Broadcast Bureau, there is no provision in the Commission's Rules to ascertain the strength or location of these daytime skywave signals. The Administrative Law Judge's ruling, therefore, was neither arbitrary or capricious nor an abuse of his discretion; the findings urged are predicated on overturning the Presiding Judge's ruling and therefore are unwarranted.
2, 7	*Granted.* There is no evidentiary support for the finding and conclusion excepted to.
3	*Granted* in substance, to the extent set forth in paragraphs 2 and 16 of the Decision.
5	*Granted* to the extent indicated in paragraph 16 of this Decision, and *denied* in all other respects as not decisionally significant.
6	*Granted.* See paragraphs 4 through 13 of this Decision.
8	*Granted* to the extent indicated in paragraphs 14 through 16 of this Decision, and *denied* in all other respects. See ruling on Exceptions 1 and 4.
9	*Granted* for the reasons stated in this Decision.

[11] Overlap of the 1 mv/m signals will occur, on the average, during less than 13% of the time WESC is in operation and *no overlap* will occur, on the average, during more than 87% of that time. See footnote 2, *supra.*

F.C.C. 71D–72

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Application of UNITED COMMUNITY ENTERPRISES, INC., GREENWOOD, S.C. For Construction Permit	Docket No. 18503 File No. BP–17439

APPEARANCES

Lawrence J. Bernard, Jr., Esq. Thomas N. Dowd, Esq. and *Peter D. O'Connell, Esq.*, on behalf of United Community Enterprises, Inc.; *John H. Midlen, Esq.*, and *John L. Martin, Esq.*, on behalf of Saluda Broadcasting Company, Inc.; *Vincent J. Curtis, Jr., Esq.* and *Frank U. Fletcher, Esq.*, on behalf of Radio Greenwood; *Robert M. Booth, Jr., Esq.*, on behalf of Grenco, Inc.; and *Philip V. Permut, Esq.*, on behalf of Chief, Broadcast Bureau, Federal Communications Commission.

INITIAL DECISION OF HEARING EXAMINER JAY A. KYLE

(Issued October 15, 1971; Released October 19, 1971)

PRELIMINARY STATEMENT

1. This proceeding involves the application of United Community Enterprises, Inc. (United) for a construction permit for a new standard broadcast station to operate on 1090 kHz, 1 kw, daytime only. On April 2, 1969 the Commission released a Memorandum Opinion and Order (FCC 69–280), 16 FCC 2d 1065, designating the applications of United and Saluda Broadcasting Company, Inc. (Saluda) for a comparative hearing as the applications were mutually exclusive for standard broadcast construction permits.

2. The Commission, through said Memorandum Opinion and Order designated the matter for hearing upon the following issues:

1. To determine the areas and populations which would receive primary service from each of the proposed operations and the availability of other primary service to such areas and populations.

2. To determine, with respect to the application of United Community Enterprises, Inc.:

(a) Whether John Y. Davenport is able to meet his $30,000 loan commitment to the applicant.

(b) Whether the $30,000 shareholder's loan and the letter of credit from the equipment manufacturer are still available and, if so, the terms and conditions thereof.

(c) Whether, in light of the evidence adduced pursuant to the above subissues, the applicant is financially qualified.

3. To determine whether a grant of the application of United Community Enterprises, Inc., would be in contravention of the provisions of Section 73.35(a) of the Commission's Rules with respect to the multiple ownership of standard broadcast stations.

4. To determine the efforts made by United Community Enterprises, Inc., to ascertain the community needs and interests of the area to be served and the manner by which the applicant proposes to meet such needs and interests.

5. To determine, with respect to the application of Saluda Broadcasting Company, Inc.:

(a) The basis of the applicant's estimated operating costs for the first year and whether such estimate is reasonable.

(b) Whether the bank loans and the equipment manufacturer's credit are still available and, if so, the terms and conditions thereof.

(c) Whether, in light of the evidence adduced pursuant to the above subissues, the applicant is financially qualified.

6. To determine, in the light of Section 307(b) of the Communications Act of 1934, as amended, which of the proposals would better provide a fair, efficient and equitable distribution of radio service.

7. To determine, in the event it is concluded that a choice between the applications should not be based solely on considerations relating to Section 307(b), which of the operations proposed in the above-captioned applications would better serve the public interest.

8. To determine, in the light of the evidence adduced pursuant to the foregoing issues, which, if either, of the applications should be granted.

3. On April 21, 1969 United filed a petition to enlarge the issues in this proceeding to include an issue to determine whether the Saluda application was a strike application. Pursuant thereto, on July 1, 1969, the Review Board added the following issues to this proceeding:

(a) To determine all the facts and circumstances concerning the preparation and filing of Saluda Broadcasting Co., Inc.'s application for a new standard broadcast station utilizing 1090 kHz with 500 watts power, daytime only, at Saluda, South Carolina;

(b) In light of the facts elicited pursuant to (a) above, to assess their effect upon the qualifications of Saluda Broadcasting Co., Inc. to be the licensee of the standard broadcast station for which it has applied.

4. On December 10, 1969 Saluda filed a petition with the Hearing Examiner requesting dismissal of its application that was granted by the Hearing Examiner in a Memorandum Opinion and Order released March 2, 1970 which dismissed the Saluda application with prejudice. This action effectively mooted all of the designated issues with the exception of Issues 2, 3, 4 and 8.

5. Prehearing conferences were held on May 6, July 18 and December 11, 1969; January 14, and March 23, 1970; and April 27, 1971. The hearing was held on July 15, 1971 upon which date the record was closed. Proposed findings of fact and conclusions of law were filed by United and the Broadcast Bureau on September 3, 1971 and replies were filed by the Broadcast Bureau on September 15, 1971 and by United on September 21, and errata thereto, on September 23, 1971.

FINDINGS OF FACT

6. United requests authorization to construct a new Class II standard broadcast station at Greenwood, South Carolina on 1090 kHz with 1 kilowatt power, daytime only. Greenwood has a population of 21,069 and is the County seat of Greenwood County with a population of

49,686 persons. Population figures referred to herein are taken from the 1970 U.S. Census Data Advance Sheets unless otherwise stated. Greenwood is located in the western part of the State, 45 miles south southeast of Greenville, South Carolina and is not part of any urbanized area. Two standard broadcast stations are authorized there, to wit, WGSW, 1350 kHz, 1 kw, D, III and WCRS, 1450 kHz, 250 watts, I kw-LS, U, IV. There is one FM station in Greenwood, namely, WCRS–FM, 96.7 mHz, 1.3 kw, 430 ft. A. There are no television stations in the City.

7. In paragraph 2 of the designation order it is observed by the Commission that United would require $57,879 to meet its proposed construction and operating costs for one year. The Commission specifically questioned United's financial ability as set out in Issue No. 2. A letter from Gates Radio Company to United dated April 27, 1971 states that United's down payment on equipment will be $5,425 with monthly equipment payments of $533.45, with an add-on finance charge of 6%. It is further noted that United proposes to meet its financial requirement with existing capital of $30,000 and a shareholder's loan of $30,000. The Commission, in its designation order, paragraph 5 said, however, that the "balance sheet of the lender-shareholder does not provide a basis to determine whether he will have the necessary net available current liquid assets to meet his loan commitments since it is impossible to ascertain whether his stock investments can be converted to provide the necessary capital." The Commission went on to state that the financial information must be updated to determine whether the line of credit from Gates was still available and whether there had been any change in the financial position of the respective parties. The Commission in its designation order found that United required $9,079 for its down payment and first year payment with interest for the equipment. This was predicated on a credit letter dated August 31, 1966 which called for equipment costing $17,400. Subsequently, on April 27, 1971 United received a new equipment credit letter. This letter provided for a 25% down payment with the balance to be financed over 36 months with first payment due 60 days after shipment of the transmitter on equipment costing $21,700. With the new credit letter at hand, United's down payment and monthly payments to Gates will be $11,826.40. Therefore, the total amount required by United is $60,626.40.

8. United has $15,052.40 in savings certificates and $1,120 on deposit in a South Carolina bank for a total of liquid assets of $16,172.40, with a liability of $6,280.01. This gives United liquid assets of $9,892.39. On March 2, 1970 United received a bank letter from the South Carolina National Bank stating that it will lend the applicant $15,000. The loan is to bear interest at the prevailing rate which at the time of the letter was 7% add-on with repayment over five years in monthly installments. Security is not required under the terms of the

loan agreement except that all stockholders must endorse the note. The two principals of the applicant, John Y. Davenport and Wallace A. Mullinax have agreed to endorse the note.

9. Davenport, one of the principals, has agreed to loan the applicant $38,000 and has agreed to waive the payment of principal and interest on the loan until such time as the payments can be made without using needed working capital. The balance sheet of Davenport as of April 15, 1971 and verified by Klugh & Co., Inc., of Anderson, South Carolina reflects that as of that date he had cash and marketable securities net of all liabilities in the amount of $55,215.20. The Davenport balance sheet as of April 15, 1971 reads as follows:

Cash:	
First National Bank of S.C.	$1,172.29
First Piedmont Bank and Trust	5,000.00
(less current liabilities of $350.00)	
	5,822.29
Real Estate:	
2½ acres at $10,000.00	25,000.00
$25,000 building on above land	25,000.00
Total Real Estate	50,000.00
Marketable Securities:	
2003—Group Securities, Inc. CSF at $13.47 bid	26,980.41
666—Southern Bank & Trust at $20.00 bid	13,320.00
3400—Southern Bank & Trust 6¼% notes at $105 bid	3,570.00
134—Putnam Vista Fund at $8.75 bid	1,172.50
200—First Piedmont Bank at $18.25 bid	3,650.00
1000 6% int. 10 yr. Fellowship Baptist Church at $70.00 bid	700.00
Total Marketable Securities	49,392.91
Closely Held Securities:	
United Community Enterprises	15,000.00
Total assets, net	120,215.20

Thus it can be seen that Davenport is in a position to loan the applicant $38,000 which he has promised. Davenport stated in an affidavit dated June 22, 1971 that he is willing to sell all of the securities listed on his balance sheet if necessary to fill his loan commitment to the applicant. He also added that he would be willing to lend the corporation an amount up to the limit of his liquid assets which as of June 22, 1971 was $55,212.13.

10. Mullinax, the other principal, has agreed to loan the applicant $14,000 and has further agreed to waive the payment of principal and interest on the loan until such payments can be made without using needed working capital. His balance sheet of April 15, 1971 reflects assets of $14,893.45 in cash and $8,972.92 in cash surrender value of life insurance policies with only liabilities of $2,650.50. Mullinax's financial statement as of April 15, 1971 is as follows:

Assets

Cash on Hand:		
C and S National Bank		$3,175.83
Carolina Federal Savings & Loan		11,117.62
First Federal Savings and Loan		600.00
Cash Surrender Value of Life Insurance:		
Prudential	(2,170.00)	
M.O.N.Y.	(3,940.00)	
M.O.N.Y.	(500.00)	
Southwestern	(646.92)	
WESC Trust	(1,716.00)	
		8,972.92
Real Estate (Home)		50,000.00
Automobiles—1969 Chevrolet, 1968 Oldsmobile		5,000.00
United Community Enterprises		15,000.00
Personal property and Household Furnishings		12,000.00
Total assets		105,916.37

Liabilities

Notes:	
S.C. National Bank	2,291.90
Southern Bank and Trust	108.60
(Current liabilities)	250.00
	2,650.50
Net Worth	103,265.87

Mullinax stated in an affidavit dated June 22, 1971 that he is willing to borrow from the insurance company an amount equal to the cash value of the policies listed on the above financial statement or to cancel said policies in return for their cash values. Thus, from the foregoing balance sheet, Mullinax appears to have a net worth of $102,265.87 from which to meet his $14,000 obligation to the applicant. In addition, both Davenport and Mullinax each had an income in excess of $15,000 after Federal income taxes for the last three years. They both plan to remain in their present jobs at Station WESC at Greenville, South Carolina after the proposed station begins operation and therefore will be able to furnish the applicant such funds as may be required to construct and operate the station up to the limits of their respective net assets which total over $75,000.

11. The finding is made that the applicant has met Issue No. 2.

12. As above noted, both Davenport and Mullinax are employed by standard broadcast station WESC in Greenville, South Carolina. Greenville is about 50 air miles from Greenwood. Davenport is a native of Greenwood and started broadcasting at WCRS, a Greenwood station, as heretofore noted. In paragraph 3 of the designation order, the Commission requires a determination of whether a grant of the United application would contravene the provisions of Section 73.35(a) of the Commission's Rules with respect to the multiple ownership of standard broadcast stations. That particular Rule reads as follows:

"No license for a standard broadcast station shall be granted to any party (including all parties under common control) if:

"(a) Such party directly or indirectly owns, operates, or controls: one or more standard broadcast stations and the grant of such license will result in any overlap of the predicted or measured 1 mv/m groundwave contours of the existing and proposed stations, * * *"

13. Davenport was, at the date of the designation order, the Vice-President and Secretary of Broadcasting Company of the Carolinas, Inc., the licensee of standard broadcast station WESC at Greenville, South Carolina. Davenport does not have any ownership interest in Broadcasting Company of the Carolinas, Inc. but is General Manager of Station WESC. Mullinax who owns the other 50% of United's stock is Station Manager and Sales Manager of both WESC–AM and WESC–FM. Both Davenport and Mullinax intend to remain in their jobs at the Greenville station after the proposed station in Greenwood begins operations.

14. Under the issue concerning the multiple ownership provision of Section 73.35(a) of the Rules, a question is raised concerning overlap of the 1.0 mv/m contours of the proposal and Station WESC, Greenville, South Carolina [1] (660 kHz, 10 kw, D; 10 kw, S.H., DA). Greenville has a population of 61,208 and is the county seat of Greenville County with a population of 240,546. It is the central city of the Greenville Standard Metropolitan Statistical Area with a population of 299,502 comprised of Greenville and Pickens Counties. Six AM, 3 FM and 2 TV stations (one educational) are authorized in Greenville.

15. In order to determine whether a grant of its application would be in contravention of the provisions of Section 73.35(a) of the Commission's Rules with respect to the multiple ownership of standard broadcast stations, United Community Enterprises, Inc. took field intensity measurements on a test transmitter installation operating on 1100 kHz at the proposed transmitter site. Nine radials were measured, six in the directions of 286, 306, 326, 346, 6 and 26 degrees true to establish the proposed 1.0 mv/m contour and three more in the directions of 126, 166 and 206 degrees true to verify the radiation pattern and efficiency of the test antenna.[2]

16. Field intensity measurements were also taken on Station WESC, Greenville, in the general direction of Greenwood. Radials in the directions of 150, 162 and 174 degrees true were measured to points beyond the 1.0 mv/m contour. The 162 degree radial which extends from WESC directly toward Greenwood was an extension of the 1966 proof-of-performance in that direction. Two side radials in the directions of 112 and 222 degrees true from the 1966 proof-of-performance were used to bracket the pertinent area. The 1.0 mv/m contour in these directions was located using ground conductivity from Figure M–3 of the Rules beyond the proof-of-performance data.

17. Station WESC operates with a non-directional antenna except during specified hours of operation from sunrise to one hour after sun-

[1] Section 73.35 reads in part as follows: No license for a standard broadcast station shall be granted to any party (including all parties under common control) if: (a) Such party directly or indirectly owns, operates, or controls: one or more standard broadcast stations and the grant of such license will result in any overlap of the predicted or measured 1 mv/m groundwave contours of the existing and proposed stations, computed in accordance with Sections 73.183 and 73.186. . . .

[2] A 78 ft. vertical antenna with a ground system consisting of 24 radials 200 ft. long and 8 ft. square ground screen was employed. A power of 250 watts determined by direct measurement was fed into the antenna.

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rise and from one hour before sunset to sunset when it operates with a directional antenna. When operating non-directionally during normal daytime mode of operation, its 1.0 mv/m contour, based on the measurement data, extends 37.5 miles toward the proposed transmitter site. In the reverse direction, the proposed 1.0 mv/m contour extends 13.5 miles toward the WESC site. This is an overlap area of 51 miles. The two transmitter sites are 52 miles apart. Therefore, there is a clearance of one mile between contours. When operating with a directional antenna during specified hours, the WESC 1.0 mv/m contour extends 44 miles toward the proposed transmitter site and thus overlaps the proposed 1.0 mv/m contour by a distance of 5.5 miles.

18. United contends that Greenwood and Greenville are separate areas and "not likely to be in competition with each other". Greenville is the hub of a standard Metropolitan Statistical Area. Greenwood, on the other hand, is alleged to be the manufacturing-wholesale-retail center of a separate 6-county area. It is to be noted that when the State of South Carolina created planning districts for the purpose of fostering area-wide economic development plans it placed Greenwood and Greenville in separate planning districts.

Issue No. 4

19. Issue No. 4 reads as follows:

4. To determine the efforts made by United Community Enterprises, Inc., to ascertain the community needs and interests of the area to be served and the manner by which the applicant proposes to meet such needs and interests.

20. United's proposed standard broadcast station will serve the City of Greenwood and surrounding Greenwood County. Over 90% of adjoining Abbeville and McCormick Counties will also receive a 0.5 mv/m or better signal from the station as will smaller portions of Edgefield, Saluda, Newberry and Laurens Counties, South Carolina, and Lincoln County, Georgia. The area receiving a 0.5 mv/m or better signal from the station contains 1230 square miles and 92,484 people. The proposed station's 2.0 mv/m contour encompasses about 95% of Greenwood County and a substantial portion of Abbeville County, including the City of Abbeville.

21. The City of Abbeville and Abbeville County are served by standard broadcast station WABV. Laurens County is served by the standard broadcast station WPCC, Clinton, and WIBG, Laurens. Newberry County is served by two standard broadcast stations, WKDK and WKMG, both located in the town of Newberry. Standard broadcast station WJES, Johnston, South Carolina, is owned by the Edgefield-Saluda Radio Co., Inc. and endeavors to serve the needs of Saluda and Saluda County. According to a letter dated July 21, 1969 from the WJES General Manager to a United principal, the station has sold advertising to most of the significant businesses in Saluda, has carried promotional announcements and programming for numerous Saluda County civic and government groups, and regularly broadcasts news items concerning the County, as well as some athletic events of County schools.

22. Since the surrounding counties, with the exception of McCormick, are already served by local radio stations, United has deter-

mined that it will attempt to meet the specific local needs of the City of Greenwood and surrounding Greenwood County. However, the applicant's survey of community leaders in the surrounding counties revealed that the problems of the people residing in Greenwood County are to a great extent the same as those in the other nearby counties. Solutions to these common problems must be found through regional cooperation and the coordinated efforts of local governments. A first step toward achieving this type of cooperation was taken by the State of South Carolina in 1967 when the Upper Savannah Economic Development District was formed. The District consists of the counties of Greenwood, Abbeville, Laurens, Saluda, McCormick and Edgefield, all of which will receive 0.5 mv/m or better service from the proposed station. These counties were grouped together because of their geographic proximity and their similar economic history and development. Greenwood is the geographic center of the six-county region, and as the change in the area's economic base from agriculture to manufacture has accelerated over the past fifteen years, the Greenwood area has become the center of wholesale and retail trade for the entire region. The following table shows the steady growth of Greenwood County, almost all of which is attributed to the city and the relatively stagnant nature of the population in the surrounding counties:

	Population		
	1950	1960	1970
Counties:			
Abbeville	22,456	21,417	21,112
Edgefield	16,591	15,735	15,692
Greenwood	41,628	44,346	49,686
Laurens	46,974	47,609	49,713
McCormick	9,577	8,629	7,955
Saluda	15,924	14,554	14,528
City of Greenwood	13,806	16,644	21,069

23. It is contended that employment in the county may be growing at an even faster pace than population. 1963 Census figures indicate that 11,545 persons were employed in manufacturing in the county in 1962. A March 1971 estimate indicates that the five largest employers in the county now have a combined total of about 11,000 employees.[3] The 1963 Census of Businesses indicated that there are at least fifteen other manufacturing establishments with 100 or more employees in the county, and a study by Wilbur Smith and Associates, Consulting Engineers and City Planners, indicates that from 1963 through 1968, 18 large plants have been built within a 30-mile radius of Greenwood.

24. Greenwood is also a wholesale distribution center for the area as is evidenced by the fact that the dollar value of wholesale sales in the city exceeded the dollar value of retail sales by about $4,000,000 in 1963. About 95% of the County's wholesale trade and about 80% of its retail trade takes place within the city. As the principal loca-

[3] The five companies are Parke, Davis & Co., surgical dressings and bandages—1,000 employees; Monsanto Company, synthetic fibers—2,200 employees; Abney Mills, textiles—700 employees; Greenwood Mills, textiles—5,000 employees; Riegel Textile Corp., textiles—2,000 employees. This estimate does not include about 1,000 workers who have been temporarily laid off from jobs at these companies within the past 12 months.

tion of the area's manufacturing and wholesale industries, Greenwood has also become the transportation hub of the area as three major railroads operate six separate lines through the County.

25. Although agriculture is still an important part of the area's economy, it is significant to note that between the 1959 and 1964 Census of Agriculture, the proportion of the County's land in farms was reduced from 60.5% to 50.6% and the number of farms declined from 838 to 671. Of the latter number, only 240 farms were classified as "commercial" by the Census and 47% of the commercial farms had sales of less than $2500 per year. Significantly, the 1964 Census of Agriculture indicates that almost 75% of the value of farm products sold came from livestock and livestock products. The Census also indicated that 87.9% of the income received by farm households was received from sources other than farming.

26. In 1966, the County's 13,420 manufacturing workers averaged $89.21 per week on salary, while wholesale workers fared only a little better at $98.19. Wage patterns were similar throughout the area.

27. Over the past forty years as the area has completed the change from a predominantly agricultural, cotton-based economy to one relying mostly on manufacture, a large part of the black population formerly employed on the farms has left the region. The following table indicates this trend:

Counties	Non-White Population (Percentage of Total Population)		
	1950	1960	1970
Abbeville	7,522 (33.5)	6,854 (32.0)	6,574 (31.14)
Edgefield	9,930 (59.5)	9,154 (58.2)	8,101 (51.66)
Greenwood	17,551 (30.2)	13,119 (29.6)	13,954 (28.08)
Laurens	14,596 (32.6)	14,039 (29.5)	14,179 (28.52)
McCormick	5,996 (62.2)	5,330 (61.8)	4,804 (60.39)
Saluda	6,791 (42.6)	5,350 (36.8)	4,900 (33.73)

28. An exhaustive study of the needs of the six-county area to be served by United's proposal was conducted on behalf of the Upper Savannah Development District by Wilbur Smith and Associates, Consulting Engineers and City Planners.[4] The following community needs-problems were identified in the study: inadequate skilled labor supply; lack of adequate industrial base; lack of sound low to low-medium income housing; inadequate recreational and cultural programs and developed facilities for all residents of the District; inadequate medical facilities; unrealistic property assessments; low median educational levels of adult non-white population; low income levels of non-white population; inadequate community and regional planning; need for a connecting highway—Greenwood to I–26; improved north-south multi-lane highway; new or improved municipal and county governmental physical facilities; need for an expanded tourist industry; inadequate library facilities; inadequate hotel and motel facilities; and rural and suburban water, sewer and drainage programs.

[4] *Final report, Overall Economic Development Plan,* July, 1968.

29. The applicant maintains that in an endeavor to design programming to meet the needs of the area to be served by the proposed station, it interviewed about 100 area residents in 1966. One of the questions asked in this survey was; "In your opinion, what is the most important local issue or problem in our community?" Replies to this question were received from forty-two of the persons interviewed. Of this number, sixteen were housewives, two were businessmen, three were retired, four were textile workers, one was a farmer, one a nurse, one a bookkeeper, one a textile mill owner and one a banker. Also answering this question in the interview were the presidents of two civic clubs, the Superintendent of Schools, the President of the Chamber of Commerce, two ministers, the Mayor of Greenwood, the Chief Sanitarian, the County Agricultural and Home Demonstration Agents, the Greenwood Police Chief and two City Councilmen.

30. The most often mentioned problem discovered in the 1966 survey it is stated was the inadequacy of recreational facilities for youth. Next came the need for new and better schools. A number of people stressed the need for long-range planning to provide more and better public services, and to achieve a balanced economy and full employment. A large number of those contacted cited the need to remove the railroad tracks from the center of Greenwood's main street and several stated there was a need for better access to state and interstate highways. Others cited the poor quality of county roads. Better care for the aged and the need for a new hospital were also mentioned.

31. Subsequently, in the spring of 1970, the applicant undertook another survey of the area's community needs. Thirty-four community leaders from the City of Greenwood and surrounding Greenwood County were interviewed. These persons included the Superintendent of Education for District 50; the Chairman of Greenwood County School Board; the Executive Director of the Greenwood Chamber of Commerce; the President of Lander College; the Administrator of Self-Memorial Hospital; the President of the Greenwood Jaycees; the President of the Chamber of Commerce; the Sheriff of Greenwood County; the President of the United Fund; the County Agricultural Agent; the City Manager; the Executive Director of Community Actions, Inc., an O.E.O. sponsored agency serving Greenwood, Abbeville and McCormick Counties; the Census Director for Greenwood County and the 3rd Congressional District; the President of Abney Mills; the President of Mutual Building & Loan Association; the President of the Student Body at Greenwood High School; the Executive Director of the American Red Cross; a Director of City Recreation Committee; the President of the Greenwood Rotary Club; the Head Custodian of the Federal Buildings (a leader of a Black Community); the Supervisor of Nursing (Acting Director) of Greenwood County Health Department; the Assistant Chief of the Greenwood Fire Department; the Chief of the Greenwood Police Department; the Assistant to Congressman Dorn of the Third District; the Executive Director of the Upper Savannah Valley District; the Public Relations Director of Greenwood Mills; the Student Body President of Lander College; the President of the Kiwanis Club; the Executive Director of Piedmont Technical Education Center; a dentist (a leader in the Black Community); the Principal of Brewer High

School (a leader in the Black Community); the Head of Women of Morris Chapel Baptist Church (a leader in the Black Community); and the Director of the Upper Savannah Development District (a leader in the Black Community).

32. The needs and problems as a result of the 1970 survey listed by these civic leaders were as follows:

1. New industry.
2. Diversified industry to employ skilled workers at high wages.
3. Lack of satisfactory number of sound low rent housing units.
4. The problem of "forced integration" of the schools which had recently been ordered by the courts at the time of the survey was mentioned by a number of people. However, the schools were successfully integrated in the fall of 1970 without violence. The problems now concern the need to bring many of the black students up to the scholastic levels of the other students.
5. Removal of the railroad tracks from the main street of Greenwood.
6. The lack of easy access to interstate highways.
7. The need for better technical education; more money and support for Piedmont Technical Institute, a recently founded trade school in Greenwood.
8. Recreation programs and facilities for youth.
9. Need to consolidate city and county governments to reduce costs and inefficiency.
10. Better distribution of information on local government proposals and programs.
11. The need for better health care encompasses more doctors and nurses, better hospital and clinic facilities and the need for a comprehensive program to provide health services in areas such as sanitation, family planning, pre-natal care, mass inoculation against diseases and an overall disease preventive program.
12. The rejuvenation of the downtown shopping area and the provision of more parking spaces.

33. In addition to the Greenwood civic leaders interviewed in the spring of 1970, the applicant also surveyed the needs of the other counties which will receive service from the proposed station. In Edgefield County, the Sheriff, the Director of Welfare and the County Agricultural Agent were interviewed. In Saluda County, the Sheriff, the Mayor, the Judge of Probate, the Director of Welfare, and the Superintendent of Education were interviewed. In McCormick County, the Superintendent of Education, the Deputy Sheriff, the Mayor of the City of McCormick, and the County Agricultural and Home Demonstration Agents were interviewed. In Abbeville County, the Chief of Police of the City of Abbeville, the Superintendent of Abbeville County Schools, the Mayor of the City of Abbeville, the County Sheriff, the Editor/Owner of Abbeville Press & Banner Newspaper and the Principal of Calhoun Falls High School were interviewed. In addition, the Mayor and the President of the local chapter of the N.A.A.C.P. were interviewed in Ninety-Six, a Greenwood County town, about ten miles from Greenwood City.

34. As a result of the survey of the outlying areas, the problems and needs were deemed by the applicant to be the following:

1. More and better diversified industry.
2. Better water supply and sewage facilities.
3. More recreation and entertainment facilities and program for young people.
4. Improved educational facilities and programs; more technical and vocational training courses for youth and adults.
5. Inadequate low rent housing.
6. Almost total lack of area public transportation.
7. Hospital shortage in several areas.
8. Lower local taxes.

35. The applicant also made a survey of the general public residing in Greenwood and its immediate environs. Mrs. A. C. Fennell, a long-time Greenwood resident, who was formerly the secretary to the County Probate Judge and the Greenwood City Solicitor was employed to make this survey. The applicant instructed Mrs. Fennell that it wished her to contact a cross-section of the community in terms of area of residence, race, occupation and economic position. Following these instructions, Mrs. Fennell compiled a list of people from the Greenwood telephone directory and Mrs. J. M. Lanford of Greenwood called each of the persons on the list and asked the following two questions:

"In your opinion, what are the major problems in the area in which you live and work?"

"What can be done to solve the problems?"

The occupations of the heads of household for thirty-five persons responding included a tailor, a secretary, a shoe repairman, a pharmacist, three doctors, a plant superintendent, an accountant, the owner of a flying service, the owner/operator of a dress shop, a teacher, two industrial engineers, an electrician, thirteen textile manufacturing plant workers, three housewives, a staff member at a children's day care center, a telephone company employee, one unidentified worker and one unemployed worker. Nine of the persons interviewed were Negroes.

36. The most frequent problem mentioned in the survey was the inadequacy of recreational facilities for youth. Several people indicated that the railroad tracks should be removed from the main street and others were concerned about traffic congestion in the city. The problem of school integration was mentioned several times. Several people complained about the trash in yards around the neighborhood and pollution from the mills. Various aspects of the economy were touched upon: unemployment, too low a standard of living and the need for low rent housing. Other problems mentioned were: downtown rejuvenation, poor lighting, and the failure of people to act like Christians toward one another.

37. In order to ascertain if any new community problems had arisen after the 1970 survey, Mullinax interviewed the following Greenwood civic leaders in late March 1971: Lawton Gardener, Greenwood Fire Inspector; John B. Clement, County Resources Conservationist; J. Harry Spann, Superintendent of Greenwood County School District

No. 50, about 9,000 students; Anna Morgan, housewife, parent of school age children; Bill Beachem, Jr., Supervisor of District Office of U.S. Congressman W. J. B. Dorn; Truman Campbell, Greenwood City Police Chief; W. M. Collins, Assistant Chief of Fire Department; R. Travis Higginbotham, Greenwood City Manager; Jones F. Buchanan, Greenwood County Purchasing Agent; Thomas J. Bryson, Greenwood County Farm Agent; and Daniel McKay, Executive Director, Greenwood County Development Board.

38. The problems and needs mentioned in these interviews, as noted by the applicant, were as follows:

1. Adequate housing—this problem is especially acute for low income groups, but also applies to the moderate and higher income groups who may wish to rent apartments or purchase small houses. Mr. Gardener indicated that some progress was being made in this area, but felt that much more needed to be done.
2. Equalization of taxes and property assessments throughout the county so that all schools could have equal facilities; consolidation of school districts within county might help this problem. More money for schools to develop broad based programs to meet the educational and occupational needs of regular students and the adult training needs of industry.
3. New, diversified industry to combat unemployment. About 1,000 workers had been laid off from manufacturing jobs in the Greenwood area.
4. Better training and equipment for the police force.
5. Additional fire station; rural fire protection; removal of railroad tracks from center of town so emergency vehicles won't be blocked.
6. Solid waste disposal.
7. Better primary and secondary county roads.
8. Education of farmers concerning livestock and pasture management.

39. On the basis of the interviews conducted over the past five years and a study of the report on the area's economy by Wilbur Smith & Associates, the applicant contends that the central problem facing Greenwood and surrounding counties is the lack of diversified high-paying industry. Several other problems facing the area are either causes or effects of the central problem. For example, it is suggested that it is difficult to attract such industry to the area because there is a serious lack of skilled workers, and until recently there were no programs in the school system to train such workers; furthermore, even if such industry did move to the area, skilled workers would be reluctant to move because of the lack of good low-cost housing.

40. The programming which United proposes to broadcast designed to publicize and discuss community needs and problems and the solutions to these problems includes the following:

1. NEWS—In a typical week, the applicant will broadcast 7 hours and 12 minutes of news programming; 40% of this programming will be devoted to local and regional events with particular emphasis placed on the six counties comprising the Upper Savannah Economic Development District. In the applicant's opinion, the economic development necessary to enhance the well-being of all of the area's citizens can only be accomplished through cooperative effort of the people and governments in all these jurisdictions. Coverage of news events from the entire area is one way in which area-wide interest and cooperation can be stimulated. A feature of the station's local news coverage will be progress reports on projects undertaken by area leaders to solve community problems. When little or no progress is being made, it will also be

reported. In this way, the electorate will have timely information on the activities of their elected representatives. Armed with this information, the applicant believes that the citizens will communicate their views to their representatives who will be stimulated to take action or risk losing votes. Day-to-day developments on projects such as the removal of the railroad tracks from the main street of Greenwood, the construction of new and better local roads, programs to obtain federal and state money for the construction of low-rent housing, the consolidation of the city-county governments, the establishment of new health care facilities and programs, and the renewal of downtown Greenwood will be subjects of close attention by the station's news reporters.

2. FARM PARADE—Each weekday at noon, the station will present a fifteen-minute program of interest to the area's farmers. County Agents from each of the six counties served by the station will participate in the program. United hopes that this program will help develop the potential resource the area has in fertile land and a long growing season in order to provide a substantial boost to the local economy not only in the form of cash to families but in the development of new industry for processing the crops. The program will also aid many of the poorest residents of the area who live in rural areas and farm their own small plots of land while also filling or seeking full-time jobs. In many cases, the application of modern farm methods to these small plots of land could bring cash to these families, as well as a substantial portion of their food.

3. HOME DEMONSTRATION TIP—Each day, a two-minute program will be produced in cooperation with the various County Agents' Offices and it will be broadcast three times each morning. This program will concern topics such as nutrition, economy in homemaking, budget management, sanitation and health care. Much of this program will be devoted to the needs of rural residents and how such families can raise their levels of health and nutrition.

4. COLLEGE, SCHOOL AND RECREATION HIGHLIGHTS—Between five and ten one-to-four minute programs will be broadcast each day publicizing the programs and activities of Lander College, a county-supported four-year college, in Greenwood, Erskine College, a four-year church-related college, in Due West, South Carolina, Piedmont-Technical Institute, a state-supported junior college and vocational training institute in Greenwood, and local high schools and recreation departments. The program will describe course offerings and job training opportunities available to full and part-time students in order to stimulate local residents to improve their job skills, to fill the skilled jobs in local industry and to serve as a resource to the area in attracting new industry. The applicant discovered that many people do not know what is available in the way of course offerings and opportunites in job training and adult education. Cultural, social and recreational activities sponsored by the schools and the local recreation departments will also be described. Although a lack of recreation programs and facilities was cited numerous times by

persons interviewed by the applicant, a member of the Board of the Greenwood Recreation Committee stated that existing programs and facilities were not being used to capacity by the residents of the area.

5. JOB MARKET—Each Saturday morning a fifteen-minute program will be broadcast in cooperation with the State Employment Security Commission and employers located in Greenwood and surrounding counties. Job openings and job training course openings will be announced. Short listings of available jobs will also be broadcast each morning in a separate program. This program primarily will help fill the need of local employers for workers and local residents for jobs, but, due to the fact that most of the job openings to be announced are expected to be for skilled workers, it is hoped that unskilled job seekers will learn of the number of higher paying jobs available and will register for the job-training courses which will also be publicized on the program. Providing a pool of skilled workers is a prime ingredient in attracting diversified high wage paying industry to the area and the applicant believes that this and the preceding program will stimulate unskilled workers to obtain better skills.

6. COMMUNITY EVENTS CALENDAR—A one-to-two-minute listing of local and regional civic meetings and affairs will be broadcast three times each weekday afternoon. Active civic groups can solve a community's problems through programs of their own—e.g., youth baseball leagues can solve a need for recreation programs—and through organizing support for or opposition to programs of government leaders. The applicant plans to cooperate with and encourage local civic groups in solving community problems through publicizing their efforts on this program.

7. OPINION PLEASE—This five-minute program will be broadcast four times each weekday. It will include a station comment on a topic of current interest to the listening audience and the recorded responses of various civic leaders and other residents. This program will deal directly with community problems. The announcer will describe a problem and suggest a solution. Community leaders into whose field the problem falls will then be asked to comment on the problem and the solution proposed. The general public will also be asked to call the station and comment on the problem or solution. If the station were now on the air, subjects such as the lack of low-cost housing, inadequate recreation programs, poor local roads, and the need to refurbish the downtown Greenwood shopping district would be discussed. The applicant believes that such discussions will stimulate the citizens of the area to solve their problems either through direct action or prodding their elected representatives.

8. YOUR ELECTED OFFICIALS SPEAK—Each Saturday at noon, the station will present a recorded five to fifteen-minute program in the nature of a report from elected representatives from the area. These programs will be recorded by U.S. Senators, the area's U.S. Congressman, and State Senators and representatives, as well as local and county officials. The applicant believes that this program will help meet a variety of problems because a

key element in an effective government being able to devise and enact programs to alleviate problems is the knowledge and support of the electorate.

9. [CALL LETTERS] SALUTES—Each Sunday afternoon, the station will present a ninety-minute program on which a local or regional agency, group or company involved in industry or any of the many facets of industrial training or promotion will be saluted. One or more officials of the organization will be invited to participate in the program. This program will be similar in format to some of the recruiting programs distributed by the Armed Forces in that musical selections will be played throughout the ninety-minute period and the guests will be interviewed between selections. It is estimated that between 20 and 35 minutes of the program will be devoted to discussion and the remainder to music. The applicant believes that this type of program will draw a substantial audience and at the same time serve to acquaint that audience with the programs of the organization being saluted. Although this format was designed to deal specifically with the need to expand existing industry and attract new, diversified firms to the area, it will also be used to treat other problems such as the need for health services in the rural areas surrounding Greenwood and the need to refurbish the downtown Greenwood shopping area. It is the applicant's intention to keep this particular program "positive" in tone. Stress will be given to the benefits which will accrue to the area if particular solutions to problems are employed; e.g., new industry will bring better payrolls and skilled new residents who will contribute to the well being and experience of the area's economy from which taxes are collected to bring needed new services and programs which will prevent disease, malnutrition, infant mortality and a host of other problems. Controversy will be avoided on this program if possible and topics which provoke controversy will be dealt with on "Opinion Please" and in regular newscasts.

10. NON-COMMERCIAL SPOT ANNOUNCEMENTS—The applicant will cooperate with local organizations in producing and broadcasting non-commercial spot announcements promoting worthwhile activities. In many cases, publicity is the most important ingredient in bringing success to a project attempting to solve a community problem. Expertise in production can often mean the difference between a spot announcement which attracts support and one that is not heard by the audience. The applicant intends to make its production personnel available on a regular basis for the purpose of advising on the production of spot announcements and other promotional activities of local organizations.

CONCLUSIONS

1. The applicant, United Community Enterprises, Inc., is seeking a construction permit for a new standard broadcast station to operate on 1090 kHz, 1 kw, daytime only, at Greenwood, South Carolina.

2. An important issue in this proceeding is Issue No. 3 which reads as follows:

To determine whether a grant of the application of United Community Enterprises, Inc., would be in contravention of the provisions of Section 73.35(a) of the Commission's Rules with respect to the multiple ownership of standard broadcast stations.

3. Section 73.35 reads in part as follows:

> No license for a standard broadcast station shall be granted to any party (including all parties under common control) if:
>
> (a) Such party directly or indirectly owns, operates, or controls: one or more standard broadcast stations and the grant of such license will result in any overlap of the predicted or measured 1 mv/m groundwave contours of the existing and proposed stations, computed in accordance with Sections 73.183 and 73.186 . . . .

The two principals of United, namely, John Y. Davenport, a 50% stockholder, is Vice-President, Secretary and General Manager of the licensee of Station WESC–AM–FM located at Greenville, South Carolina while Wallace A. Mullinax, the other 50% stockholder, is Sales Manager and Station Manager of WESC–AM–FM. Greenville and Greenwood are approximately 50 miles apart.

4. In order to determine whether a grant of its application would be in contravention of the provisions of Section 73.35(a) of the Commission's Rules with respect to the multiple ownership of standard broadcast stations, United took field intensity measurements on a test transmitter installation operating on 1100 kHz at the proposed transmitter site. Nine radials were measured, six in the directions of 286, 306, 326, 346, 6 and 26 degrees true to establish the proposed 1.0 mv/m contour and three more in the directions of 126, 166 and 206 degrees true to verify the radiation pattern and efficiency of the test antenna.[5]

5. Field intensity measurements were also taken on Station WESC, Greenville, in the general direction of Greenwood. Radials in the directions of 150, 162 and 174 degrees true were measured to points beyond the 1.0 mv/m contour. The 162 degree radial which extends from WESC directly toward Greenwood was an extension of the 1966 proof-of-performance in that direction. Two side radials in the directions of 112 and 222 degrees true from the 1966 proof-of-performance were used to bracket the pertinent area. The 1.0 mv/m contour in these directions was located using ground conductivity from Figure M–3 of the Rules beyond the proof-of-performance data.

6. Station WESC operates with a non-directional antenna except during specified hours of operation from sunrise to one hour after sunrise and from one hour before sunset to sunset when it operates with a directional antenna. When operating non-directionally during normal daytime mode of operation, its 1.0 mv/m contour, based on the measurement data, extends 37.5 miles toward the proposed transmitter site. In the reverse direction, the proposed 1.0 mv/m contour extends 13.5 miles toward the WESC site. The two transmitter sites are 52 miles apart. Thus, there is a clearance of one mile between contours. When operating with a directional antenna during specified hours, the WESC 1.0 mv/m contour extends 44 miles toward the proposed

[5] A 78 ft. vertical antenna with a ground system consisting of 24 radials 200 ft. long and 8 ft. square ground screen was employed. A power of 250 watts determined by direct measurement was fed into the antenna.

transmitter site and thus overlaps the proposed 1.0 mv/m contour by a distance of 5.5 miles.[6]

7. In *Anadarko Broadcasting Co.*, 22 FCC 2d 573, which was a letter addressed to Allan Pratt Page d/b as Anadarko Broadcasting Co., Radio Station KRPT, Enid, Oklahoma, the Commission said in reference to Section 73.35 of the Rules, the following:

> "Under the Commission's construction of the rule, you cannot hold managerial positions, partnership interests, or be an officer or director of two overlapping stations in the same service. Nor can you hold factual or legal control of such stations. See WECT(TV), Public Notice of January 13, 1966—mimeo 78695." (574)

In light of the letter in *Anadarko Broadcasting Co.*, the only logical conclusion that can be reached is that Mullinax and Davenport hold positions at WESC–AM and FM which clearly lets their positions fall within the purview of Section 73.35(a) if it is concluded that an overlap situation exists or condition prevails in the situation here under consideration.

8. As just observed above, in order to determine whether a grant of its application would be in contravention of the provisions of Section 73.35(a) of the Commission's Rules, United took field intensity measurements of WESC and on a test transmitter installation operating on 1100 kHz at the proposed transmitter site. The field intensity measurements showed that when WESC operates with a directional antenna, from sunrise to one hour after sunrise and from one hour before sunset to sunset, the 1 mv/m contour of the proposed station creates an overlap area of 51 square miles.

9. In the order of designation there is no provision for consideration by the Hearing Examiner of whether there is a basis or not for a waiver of Section 73.35(a). There is no issue designated to make a determination as to whether or not a waiver of Section 73.35(a) would be appropriate. No request was made by the applicant for a waiver and none was given. There is no authority for the Hearing Examiner, on his own, as pointed out by the Broadcast Bureau, in the absence of a waiver issue, to grant a waiver under conditions that exist here unless directly authorized by the Commission to consider the question of a waiver of said section. The conclusion must be that since the proposal here contravenes Section 73.35(a), the grant cannot be made for that reason alone.

10. The Commission designated a financial issue against the applicant which is Issue No. 2. This issue reads as follows:

> To determine, with respect to the application of United Community Enterprises, Inc.:
>
> (a) Whether John Y. Davenport is able to meet his $30,000 loan commitment to the applicant.
>
> (b) Whether the $30,000 shareholder's loan and the letter of credit from the equipment manufacturer are still available and, if so, the terms and conditions thereof.
>
> (c) Whether, in light of the evidence adduced pursuant to the above sub-issues, the applicant is financially qualified.

11. A letter from Gates Radio Company to United dated April 27, 1971 states that United's down payment on equipment will be $5,425

[6] The applicant showed that the 1.0 mv/m overlap area contains 1,791 persons in a 51 square mile area and includes the community of Hodges (1970 pop. 214) in Greenwood County and that from 8 to 10 .05 mv/m services are available therein.

with monthly payments of $533.45 with a finance charge of an additional 6%. This letter of April 27, 1971 was substituted for an earlier letter from Gates under date of August 31, 1966. The new credit letter provides that United's down payment and monthly payment to Gates will be $11,826.40. Therefore the total amount required by United is $60,626.40.

12. United has $15,052.40 in savings certificates and $1,120.05 on deposit in a bank in South Carolina, giving it total liquid assets of $16,172.40 with a liability of $6,280.01. This provides United with liquid assets of $9,892.39. On March 2, 1970 United received a bank letter from the South Carolina National Bank providing for a loan to the applicant of $15,000 with repayment over five years in monthly installments without security except that the two stockholders, Davenport and Mullinax must endorse the note. The interest on this new loan is 7%.

13. Davenport is to loan United $38,000 and agreed to waive the payment of principal and interest on the loan until such time as payments can be made without using needed working capital. A balance sheet submitted by Davenport as of April 15, 1971 showed total net assets of $120,215.20. Davenport, in an affidavit dated June 22, 1971, stated that he was willing to sell all of the securities listed on the balance sheet in order to meet his commitment to the applicant. Mullinax, the other 50% stockholder, agreed to loan United $14,000 and as Davenport, agreed to waive the payment of principal and interest on the loan until such payments can be made without using needed working capital. As of April 15, 1971 Mullinax's financial statement reflected assets of $105,916.37 with only liabilities of $2,650.50 leaving a net worth of $103,265.87.

14. It is here concluded that the applicant has met the burden of proof respecting Issue No. 2 and is financially qualified to construct and operate its proposed station.

15. As to Issue No. 4, the conclusion is reached that United has made substantial endeavors to ascertain the community needs and interests of the area that it proposes to serve with its new radio station and, further, the manner in which the applicant proceeded to ascertain these needs and interests is adequate and sufficient.

16. In view of the foregoing Findings of Fact and Conclusions of Law and upon careful evaluation of the entire record in this proceeding, it is concluded that a grant of the application of United Community Enterprises, Inc. for a construction permit for a new standard broadcast station to operate on 1090 kHz, 1 kw, daytime only, will not serve the public interest, convenience and necessity.

Accordingly, IT IS ORDERED that unless an appeal to the Commission from this Initial Decision is taken by the applicant, or the Commission reviews the Initial Decision on its own motion in accordance with Section 1.276 of the Commission's Rules, the application of United Community Enterprises, Inc. for a construction permit for a new standard broadcast station to operate on 1090 kHz, 1 kw, daytime only, in Greenwood, South Carolina, IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION,
JAY A. KYLE, *Hearing Examiner.*